

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.



In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

DOCKET NO. 14-CRB-0001-WR
(2016-2020)

RECEIVED

OCT 27 2014

Copyright Royalty Board

**SOUNDEXCHANGE'S RESPONSE TO THE SERVICES' JOINT MOTION TO
COMPEL SOUNDEXCHANGE TO PRODUCE LICENSE AGREEMENTS AND
OTHER DOCUMENTS WITHHELD ON CONFIDENTIALITY GROUNDS**

This Response by SoundExchange, Inc. ("SoundExchange") addresses two points: (1) SoundExchange's non-opposition to the Motion; and (2) SoundExchange's response to unwarranted accusations in the Motion.

I. SOUNDEXCHANGE DOES NOT OPPOSE THE MOTION OR THE ISSUANCE OF A STANDING ORDER APPLICABLE TO ALL PARTICIPANTS AND ALL OTHERWISE DISCOVERABLE INFORMATION

SoundExchange has withheld otherwise discoverable documents at issue in this proceeding to the extent such documents contain terms that bar their disclosure absent consent of non-parties or a court order. SoundExchange has sought, but not obtained, that third-party consent and, in some cases, has received third-party objections to the production of the documents in question. But a court order would allow for production of documents consistent with contractual obligations, and thus moot the Motion. Should the Judges order

SoundExchange to produce documents withheld on this basis, SoundExchange will do so promptly.¹

SoundExchange also does not oppose the issuance of a standing order for the remainder of the proceeding that applies equally to all participants and all otherwise discoverable information. To the extent the Moving Services ask for a standing order that applies *only* to SoundExchange, SoundExchange opposes that request. There is no basis to single out SoundExchange because the challenges of obtaining third-party consent and confidentiality concerns are not limited to SoundExchange. Other participants are withholding documents on the same basis as SoundExchange, and certain of the Moving Services have done so in the past. Declaration of Anjan Choudhury (“Choudhury Decl.”) at ¶¶ 12, 14-15, attached as Exhibit A. All participants—including SoundExchange—would benefit from avoiding future motion practice on the same issue. Finally, the Moving Services cite no authority to prove that the “inherent authority” conferred by Section 801(c) of the Copyright Act should apply as a one-sided penalty.

¹ While SoundExchange does not oppose the Motion as it applies to documents that are *otherwise discoverable*, SoundExchange would oppose an order that simply ordered production of the documents on the list attached to the Motion. Upon further review of that list, there appear to be a subset of documents that were inadvertently included and were not relied upon by SoundExchange witnesses. SoundExchange is reviewing these documents to determine whether they are discoverable on another basis. To the extent there are any inadvertent errors on the original list, SoundExchange will also provide a revised list to participants of documents withheld only on confidentiality grounds that were relied upon by SoundExchange’s witnesses. SoundExchange respectfully requests that should the Judges grant the order requested by the Moving Services, the Judges do so with respect to documents that were withheld on the basis of confidentiality obligations but are otherwise discoverable, rather than the specific schedule of documents attached to the Motion.

II. THE MOTION MISCHARACTERIZES THE AGREEMENT AND ACTIONS OF THE PARTICIPANTS

The Motion unnecessarily mischaracterizes the actions of SoundExchange in a manner that merits a response. The participants knew that many documents would be subject to third-party contractual obligations that would affect their production, and provided for how to handle such matters in their Discovery Agreement. Choudhury Decl. at ¶ 4 & Ex. 1. By following that Agreement, SoundExchange is not engaging in a “tactic” to “minimize the Moving Services’ ability to use this discovery.” Motion at 4, 12. That accusation tells considerably less than the whole story in an effort to bias the Judges against SoundExchange by attacking its discovery efforts. The Moving Services fail to acknowledge that:

- SoundExchange provided notice and, where appropriate, sought to obtain consent from third parties in a timely fashion. Choudhury Decl. at ¶¶ 5-7.
- In its Initial Disclosures, SoundExchange attempted to identify in good faith certain documents for the Moving Services that require consent or a court order. Choudhury Decl. at ¶ 8-9. The Moving Services then elected to wait two weeks to bring a motion to compel.
- SoundExchange also produced nearly 3,200 documents (52,000 pages) of responsive material, including more than 600 agreement-related documents and more than 2,000 separate royalty or reporting statements. Choudhury Decl. at ¶ 10. By contrast, the six Moving Services *combined* produced a total of 136 documents. *Id.* at ¶ 11.
- SoundExchange absolutely has a lawful basis—indeed, an *obligation*—to withhold documents that require either consent or a court order. The Moving Services attempt to suggest otherwise by quite literally copying and pasting *word for word* the legal authorities discussion of the *SDARS II* brief of Music Choice (then-represented by SiriusXM’s current counsel). *Compare* Motion at 8-10, *with* Choudhury Decl., Ex. 3 at 5-8 (Music Choice Motion to Compel SoundExchange to Produce License Agreements and Other Documents Withheld on Confidentiality Grounds (Jan. 13, 2012)). SoundExchange previously addressed why each of the authorities addressed there and here are inapposite and rather than re-hash the same, has attached its previous response. *See* Choudhury Decl., Ex. 4 at 4-5 (SoundExchange Opposition to Music Choice Motion to Compel (Jan. 20, 2012)).
- SoundExchange is not alone in withholding certain documents to the extent contractual obligations require as much. Other licensee participants, including Pandora and iHeartMedia, are currently withholding information on the basis of contractual

obligations, and one of the Moving Services (SiriusXM) did the same in *SDARS II*. Choudhury Decl. at ¶¶ 12, 14-15.

- As the Motion acknowledges, digital service counterparties have raised objections in response to SoundExchange's attempts to obtain consent or production of information in this proceeding. Choudhury Decl. at ¶¶ 16-17. These disputes confirm that SoundExchange is not delaying or tactically withholding these documents – it has taken its discovery obligations seriously.²

The Moving Services' effort to inject mudslinging into this straightforward non-controversy is transparent and baseless, and we ask the Judges to disregard it.

III. CONCLUSION

SoundExchange respectfully responds that it is not opposed to the Motion to the extent that it only applies to information or documents that are otherwise discoverable and that any standing order apply to all participants.

² SoundExchange has received objections to its production of documents from former participants Beats Music, Inc. ("Beats") and Spotify, Inc. ("Spotify") that are related to issues raised by this Motion. See Choudhury Decl. at ¶ 16-17. SoundExchange provided a courtesy copy of the Motion on the same day it was served, and later requested Beats and Spotify advise by the morning of October 27 if they intended to raise those issues in response to this Motion, so that SoundExchange could address such issues at the same time. *Id.* at ¶¶ 18-19. Beats did not respond to this inquiry and on the morning of October 27, Spotify advised it would seek an extension to file a response. *Id.* at ¶¶ 19-20. Should these services file responses addressing SoundExchange or its actions, SoundExchange respectfully requests the opportunity to respond.

Dated: October 27, 2014

Respectfully submitted,

By:

Glenn Pomerantz / zu

Glenn D. Pomerantz (CA Bar 112503)

Kelly M. Klaus (CA Bar 161091)

Anjan Choudhury (DC Bar 497271)

MUNGER, TOLLES & OLSON LLP

355 S. Grand Avenue, 35th Floor

Los Angeles, CA 90071-1560

Telephone: (213) 683-9100

Facsimile: (213) 687-3702

Glenn.Pomerantz@mto.com

Kelly.Klaus@mto.com

Anjan.Choudhury@mto.com

Counsel for SoundExchange, Inc.

EXHIBIT A

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

DOCKET NO. 14-CRB-0001-WR
(2016-2020)

DECLARATION OF ANJAN CHOUDHURY

I, Anjan Choudhury, declare as follows:

1. I am an attorney with Munger, Tolles & Olson LLP and am counsel for SoundExchange, Inc. ("SoundExchange") in Docket No. 14-CRB-0001-WR (2016-2020).
2. I respectfully submit this Declaration in support of SoundExchange's Response to the Moving Services' Joint Motion to Compel SoundExchange to Produce License Agreements and Other Documents Withheld on Confidentiality Grounds (the "Motion").
3. This Declaration is made based upon my personal knowledge.
4. In July of 2014, the participants entered in to an agreement concerning the conduct of discovery in this matter ("Discovery Agreement"), presenting it to the Copyright Royalty Judges ("Judges") as part of a proposed scheduling order. A true and correct copy of the Discovery Agreement is attached hereto as Exhibit 1. The parties have agreed to abide by the Discovery Agreement except where it is superseded by order of the Judges. Paragraph 21(b) of the Discovery Agreement anticipates that third-party consent or a court order may be required before production of certain documents relied upon by witnesses in preparing their

testimony, and sets forth a process for dealing with that issue. The process requires parties to attempt in good faith to seek consent prior to the first day of discovery, to identify documents where consent has not been obtained, and to cooperate, consistent with their contractual obligations, and not oppose a motion compelling disclosure except where contractually obligated to do so.

5. On August 29, 2014, on the same day that the Judges issued their Order Establishing Revised Case Schedules, counsel for SoundExchange proposed a draft protective order to counsel for Pandora Media, Inc. ("Pandora") and the National Association of Broadcasters ("NAB"). Those counsel had coordinated the licensee participants with respect to other motions in the case, including the Joint Motion for Issuance of Discovery Schedule and of Case Schedule. SoundExchange asked those counsel to advise whether the proposed draft was agreeable to their clients and the other service participants and if so, offered to draft a joint motion to adopt the protective order for filing with the Judges. Both counsel confirmed the next morning that they would review the SoundExchange draft.

6. On September 12, 2014, SoundExchange received comments on its draft from Pandora and NAB and learned that its proposed draft had not yet been shared with other licensee participants. The next morning, on September 13, 2014, counsel for SoundExchange circulated a proposed protective order, including revisions from Pandora and NAB, to all participants and indicated a desire to file a proposed protective order by September 18, 2014. The parties were ultimately able to agree on most issues and filed a Joint Motion for a Protective Order on September 23, 2014, subject to the objections raised by Apple, Inc. with the Judges.

7. Once the protective order had been proposed, SoundExchange sent letters

within a week by overnight mail either providing notice or seeking consent, as appropriate, to contractual counterparties for all of the documents in question. These letters advised the contractual counterparties of the potential for disclosure and the terms of the protective order that had been agreed to by the participants. Where the counterparty remained a participant in the proceeding, a courtesy copy was also e-mailed to their outside counsel.

8. In some instances where consent was required, SoundExchange was not able to obtain consent prior to the production of Initial Disclosures and withheld documents on that basis.

9. As part of its Initial Disclosures, SoundExchange withheld certain documents on the basis of contractual obligations requiring either third-party content or a court order. SoundExchange prepared and produced a schedule of all documents withheld at the time based on contractual confidentiality obligations. We are currently confirming whether all of the documents listed on that schedule were in fact relied on by SoundExchange witnesses. We now believe it is likely that a subset of documents listed on that schedule were not. If the Judges order production of documents withheld solely on contractual confidentiality grounds, SoundExchange will promptly confirm and produce the documents that were relied upon by its witnesses.

10. Aside from this limited withholding, SoundExchange produced nearly 3,200 documents (more than 52,000 pages) of responsive material in Initial Disclosures. This included more than 600 agreement or amendment-related documents and over 2,000 royalty or reporting statement documents pursuant to the same agreements.

11. The six Moving Services produced a combined total of 136 documents, which comprise 9 native files and 3,368 pages of material, as Initial Disclosures. In particular, the

Moving Services productions were as follows: NAB (100 documents), SiriusXM (18 documents), NRBNMLC (10 documents), AccuRadio (8 documents), IBS (no documents), and WHRB (no documents).

12. The practice of withholding documents based on confidentiality obligations is consistent with the past practice of Sirius XM Radio Inc. ("SiriusXM"), one of the Moving Services, as Sirius XM withheld documents from its Initial Disclosures in the *SDARS II* pursuant to applicable confidentiality provisions. Attached as Exhibit 2 is a true and correct copy of the schedule of documents, dated January 9, 2011,¹ provided by SiriusXM.

13. In the *SDARS II* proceeding, Music Choice (but not SiriusXM) objected to SoundExchange's withholding of documents from its Initial Disclosures on confidentiality grounds. I have reviewed Music Choice's Motion to Compel in that proceeding, prepared by SiriusXM's counsel in this proceeding, and found that Part I.B (pp. 5-8) of that motion is identical to Part I.B (pp. 8-10) of the Moving Services' Motion. SoundExchange already addressed the authorities and points made in that section in its opposition to Music Choice's motions. Attached as Exhibits 3 and 4 are true and correct copies of Music Choice's motion to compel and SoundExchange's opposition to the same.

14. I am also aware that other participants in this proceeding are currently withholding documents or information that are otherwise discoverable on the basis of contractual obligations. On October 13, 2014, counsel for Pandora Media, Inc. ("Pandora") informed me that with respect to the initial disclosures related to the testimony of Pandora witness Steve McBride, there is certain confidential data underlying the promotion

¹ Based on the discovery schedule in that proceeding, I believe the document was incorrectly dated by SiriusXM and was actually the schedule as of January 9, 2012.

experiments the witness describes that Pandora cannot produce given certain confidentiality restrictions imposed on the data by a contractual third party. Attached hereto as **Exhibit 5** is a true and correct copy of that e-mail communication.

15. iHeartMedia, Inc. (“iHeartMedia”) has also withheld otherwise discoverable information on the basis of contractual obligations. The written direct testimony of Dr. Brett Danaher relies on panel data from an unnamed source which iHeartMedia refers to as “Tracker” and claims that Dr. Danaher’s “contract with Tracker prohibits [him] from revealing their name.” Testimony of Brett Danaher (Public Version), at p. 4, fn. 3. Attached for the convenience of the Judges as **Exhibit 6** is a true and correct copy of that witness statement.

16. Prior to the filing of its written direct testimony or production of Initial Disclosures, counsel for SoundExchange also received objections from Beats Music, Inc. (“Beats”) and from Spotify, Inc. (“Spotify”). Based on the specific contractual provision at issue between the record company and Beats or Spotify, certain documents were withheld or testimony redacted. If consent is obtained or the Judges order disclosure, SoundExchange will produce the documents and file corrected, unredacted versions of the witness testimony.

17. Both Beats and Spotify were participants from the commencement of the proceeding and at least through the filing of the proposed protective order. Through their counsel, they received the briefing of the participants and Order of the Judges in response to the March 2014 subpoena motions of Pandora and NAB. They also joined in the Joint Motion for Issuance of a Discovery Schedule and Alteration of Case Schedule, which attached the Discovery Agreement. They also received SoundExchange’s proposed protective order and were copied on the communications between all participants about the protective order in September 2014. Beats’s parent company, Apple, Inc., submitted its own opposition to the

proposed protective order on September 30, 2014.


18. On October 20, 2014, the same day that SoundExchange received the Motion, I contacted the outside counsel retained by Spotify and Beats. I provided each with a courtesy copy of the public version of the Motion as well as a list for each company of documents related to that company that were included in the schedule attached to the Motion.

19. On October 24, 2014, counsel for SoundExchange requested that Beats and Spotify advise whether they intend to file a brief by the morning of October 27, 2014 responding to the Motion and what issues they intend to address in their brief so that SoundExchange could address the same. Beats provided no response by the morning of October 27.

20. On October 27, 2014, the same day that responses are due to the Motion, counsel for SoundExchange was informed that Spotify had retained new outside counsel and that they would be seeking an extension to file a response by Friday, October 31.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury under the laws of the United States that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: October 27, 2014


Anjan Choudhury (DC Bar #97271)
MUNGER, TOLLES & OLSON LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Anjan.Choudhury@mto.com

Counsel for SoundExchange, Inc.

EXHIBIT 1

APPENDIX A

Direct-Phase Proceedings and Discovery Schedule:

1. Written direct statements filed: October 7, 2014
2. First day of discovery period: October 9, 2014
3. Initial disclosures: October 9, 2014
4. Document requests.

(a) **Limits.** In the direct phase of discovery, SoundExchange and GEO Music Group shall be collectively limited to 200 document requests and the service-side participants shall be collectively limited to 200 document requests. All parties may serve no more than two sets of documents requests on any other party.

(b) **First Set of Document Requests and Responses.** The parties' first set of requests shall be served on or before October 13, 2014. The parties must serve written responses/objections and produce responsive documents to the first set of document requests for delivery no later than November 7, 2014.

(c) **Second Set of Document Requests and Responses.** The parties' second set of requests shall be served on or before November 11, 2014. The parties must serve written responses/objections and produce responsive documents to the second set of document requests for delivery no later than December 3, 2014. For the sake of clarity, a party is free to serve requests on another party on or before November 11, 2014 even if the party seeking documents did not serve requests on the responding party on or before October 13, 2014.

5. Interrogatories.

(a) **Limits.** Sound Exchange and GEO Music Group shall be collectively limited to 25 interrogatories, and the service-side participants shall be collectively limited to 25 interrogatories, for the direct- and rebuttal-phase discovery periods, combined. In the direct phase of discovery, all parties may serve no more than two sets of interrogatories on any other party.

(b) **First Set of Interrogatories.** The parties' first set of interrogatories shall be served on or before October 14, 2014. Parties must serve written responses/objections for delivery no later than November 8, 2014.

(c) **Second Set of Interrogatories.** The parties' second set of interrogatories shall be served on or before November 11, 2014. The parties must serve written responses/objections for delivery no later than December 4, 2014. For the sake of clarity, a party is free to serve interrogatories on another party on or before November 11, 2014 even if the party seeking interrogatory responses did not serve interrogatories on the responding party on or before October 14, 2014.

6. Last day for noticing direct-phase depositions: November 17, 2014.

7. Last day of discovery period: December 8, 2014.

8. Motions to Compel.

Motions to compel may be filed at any time on or before the final day of the Discovery Period, December 8, 2014. Oppositions to motions to compel shall be filed within six (6) business days of service of the motions. Replies in further support of motions to compel shall be filed within three (3) business days of service of the oppositions.

9. Amended Written Direct Testimony.

The deadline for filing amended written direct statements shall be December 23, 2014.

10. Settlement Conference.

The parties will hold the post-discovery settlement conference no later than December 29, 2014. By January 7, 2015, the parties shall file with the Judges a written Joint Settlement Conference Report indicating the extent to which they have reached a settlement.

Rebuttal-Phase Proceedings and Discovery Schedule

11. Filing of written rebuttal statements: February 17, 2015.

In addition to the subject matter set forth for written rebuttal statements in the Judges' February 19, 2014, Scheduling Order, such statements may include updates on topics presented by the same witness in a written direct statement to reflect new information on such topics that became available to the witness after the submission of the written direct statement.

12. First day of rebuttal-phase discovery: February 20, 2015.

13. Initial disclosures: February 20, 2015.

14. Last day of rebuttal-phase discovery period: March 23, 2015.

15. Motions to Compel.

Motions to compel may be filed at any time on or before the final day of the rebuttal discovery period, March 23, 2015. Oppositions to motions to compel shall be filed within six (6) business days of service of the motions. Replies in further support of motions to compel shall be filed within three (3) business days of service of the oppositions.

16. Amended Written Rebuttal Statements.

The deadline for filing amended written rebuttal statements shall be April 7, 2015.

Unified Hearing and Post-Hearing Schedule

17. Motions in Limine.

Motions in limine shall be filed on or before April 10, 2015. Oppositions to motions in limine shall be filed on or before April 17, 2015. There shall be no replies on motions in limine.

18. Unified Hearing.

(a) The Judges will hold a single, unified hearing to encompass the direct and rebuttal phases of this proceeding.

(b) At such hearing, a witness will be permitted to present the testimony set forth in his or her written statement(s) and to respond to written rebuttal statements by other parties' witnesses addressing subjects that the testifying witness addressed in his or her direct or rebuttal statement. Witnesses will not, however, be permitted to testify about new data or analyses undertaken by that witness that were not presented in the witness's written direct or rebuttal statement or to refer to or rely on documents or information not previously provided during discovery.

(c) The hearing in this proceeding shall commence on April 27, 2015, and shall be completed no later than May 29, 2015.

19. Proposed Findings of Fact and Conclusions of Law.

(a) The participants shall file and serve their proposed findings of fact and conclusions of law on June 23, 2015.

(b) The participants shall file and serve their reply findings of fact and conclusions of law on July 17, 2015.

20. Closing Argument.

The closing argument in this proceeding shall be held on July 24, 2015.

Provisions Concerning Conduct of Discovery

21. Initial Disclosures.

(a) On the first day of discovery of the direct- and rebuttal-phase discovery periods, all parties shall produce the documents that witnesses relied upon in preparing their written direct testimony.

(b) In the event that third-party consent or a court order is required before the documents referenced in Paragraph 21(a) can be produced, the party(ies) whose witnesses relied on such documents will attempt in good faith to seek such consent of the third parties with sufficient time to obtain such consent and produce the relevant documents by the first day of discovery. In the event that such consent has not been received for certain documents, on the

first day of discovery, the party(ies) will inform the other parties of the identity and/or nature of the documents for which consent has not been received. The parties will promptly thereafter cooperate, to the extent consistent with contractual obligations, to seek an order from the Judges compelling disclosure and, in any event, will not oppose a motion seeking such an order except to the extent that they are contractually required to do so. Withholding documents while seeking third-party consent shall be without prejudice to any party's ability to move to compel or seek other appropriate relief or remedies.

22. Service and Production.

(a) Parties shall serve document production requests, interrogatories, deposition notices, written responses/objections, motions, oppositions and replies on other parties via email by 5 p.m. on the due date.

(b) Parties shall produce documents in usable and legible formats. Document productions shall be sent by FTP site or comparable mode of delivery, including via email, by 8 p.m. Eastern Time on the date they are due. With respect to Excel spreadsheets created by any witness (or by any witness's staff or research team), or created in connection with any witness's testimony, parties shall produce them in native format maintaining all embedded formulas and settings (subject to any applicable privileges that may apply). With respect to other specific Excel spreadsheets, parties shall endeavor to produce them in native format maintaining all embedded formulas and settings, but only when specifically requested and with reasonable notice. Parties shall cooperate in good faith with respect to document format and production specifications.

23. Depositions.

(a) Notice. Deposition notices must provide at least ten calendar days' notice of the deposition's date, unless less notice is mutually agreed upon by the parties. The parties will make a good faith effort to serve deposition notices as early as possible.

(b) Notice to Judges. The party noticing a deposition is responsible for informing the Judges in writing of the name of the deponent, location, date, time, and contact information for counsel for each deposition.

(c) The participants will give the Judges reasonable notice to enable one or more Judges to be available by telephone during depositions to resolve disputes that may arise.

24. Motions to Compel.

The parties must meet and confer about the particular discovery dispute(s) at issue before filing a motion to compel.

25. No Prejudice

Nothing contained in the foregoing shall prejudice any party or parties from seeking further relief from the Judges.

EXHIBIT 2

**AGREEMENTS SIRIUS XM HAS NOT YET PRODUCED PURSUANT TO APPLICABLE
CONFIDENTIALITY PROVISIONS
(JANUARY 9, 2011)**

- Letter Agreement, dated July 1, 2011, between Sirius XM Radio Inc. and Capitol Records, LLC re: Frank Sinatra
- Letter Agreement, dated May 1, 2011, between Sirius XM Radio Inc. and Capitol Records, LLC re: Frank Sinatra
- Letter Agreement, dated September 1, 2011, between Sirius XM Radio Inc. and Capitol Records, LLC re: Frank Sinatra
- Marketing Agreement, dated December 22, 2006, between XM Satellite Radio Inc. and American Honda Motor Co., Inc.
- Automotive Distribution Agreement, dated August 3, 2011, between Sirius XM Radio Inc. and Mercedes-Benz USA, LLC
- 2006 Automotive Distribution Agreement, dated March 14, 2006, between Sirius Satellite Radio Inc. and Volkswagen of America, Inc.
- First Amendment to the 2006 Automotive Distribution Agreement, dated April 22, 2008, between Sirius Satellite Radio Inc. and Volkswagen Group of America, Inc.
- Second Amendment to the 2006 Automotive Distribution Agreement, dated September 23, 2009, between Sirius XM Radio Inc. and Volkswagen Group of America, Inc.
- Third Amendment to the 2006 Automotive Distribution Agreement, dated August 19, 2011, between Sirius XM Radio Inc. and Volkswagen Group of America, Inc.
- 2011-2015 Agreement between Howard Stern and Sirius XM Inc.
- Summary of Principal Terms and Conditions, dated December 2, 2003, between NFL Enterprises LLC and Sirius Satellite Radio Inc.
- Amendment No. 1 to the Satellite Radio Rights Agreement, dated January 23, 2009, between NFL Enterprises LLC and Sirius Satellite Radio Inc.
- Satellite Radio Rights Agreement, dated November 24, 2010, between NFL Enterprises LLC and Sirius XM Radio Inc.
- First Amendment to the Satellite Radio Rights Agreement, dated October 13, 2011, between NFL Enterprises LLC and Sirius XM Radio Inc.

EXHIBIT 3

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.



In the Matter of

Determination of Rates and Terms for
Preexisting Subscription and Satellite Digital
Audio Radio Services

Docket No. 2011-1 CRB PSS/Satellite II

MUSIC CHOICE'S MOTION TO COMPEL SOUNDEXCHANGE TO PRODUCE LICENSE
AGREEMENTS AND OTHER DOCUMENTS WITHHELD ON CONFIDENTIALITY GROUNDS

INTRODUCTION AND SUMMARY

Pursuant to 17 U.S.C. § 803(b)(6)(C)(v) - (vi) and 37 C.F.R. § 351.5(b) - (c), Music Choice hereby respectfully requests that the Copyright Royalty Judges ("Judges") (1) compel SoundExchange to produce, within three business days, all license agreements and other documents it is withholding solely on confidentiality grounds; (2) issue a standing order applicable to the remainder of this proceeding that SoundExchange produce any documents subject to confidentiality restrictions that are otherwise discoverable without delay, irrespective of whether third-party consent has been requested or received; and (3) preclude SoundExchange from relying at trial upon any documents withheld solely on confidentiality grounds. Pursuant to 37 C.F.R. § 351.1(b)(1), Music Choice certifies that the parties have met and conferred on these issues in a good faith effort to resolve the discovery disputes raised in this Motion. Based upon these discussions, Music Choice understands that SoundExchange does not substantively object to producing the documents at issue, but will not do so until such time as they have either (1) consent of the various agreements' counterparties or (2) an order from the Judges compelling production.

Several of SoundExchange's witnesses explicitly reference numerous license agreements between the record labels and third parties, and use those agreements as benchmarks supporting SoundExchange's proposed rates. In order to streamline discovery, the parties agreed that they would produce all documents relied upon by their witnesses at the beginning of discovery without the need for formal document requests. At the parties' request, the Judges adopted this agreement along with other agreed provisions for the direct phase discovery schedule in their Order, dated January 3, 2012 (the "Discovery Schedule").

On January 9, 2012, Music Choice produced all documents relied upon by its witnesses. SoundExchange, however, has withheld production of over 35 documents relied upon by its witnesses. Attached as Exhibit A is a true and correct copy of a schedule of withheld documents, served by SoundExchange on January 9, 2012. SoundExchange's sole reason for refusing to produce the documents is the presence of confidentiality provisions in the relevant agreements, which purport to require consent of the counterparty or a court order before the agreements may be disclosed to third parties. Notwithstanding the fact that its member record companies disclosed these agreements to SoundExchange and its experts several months ago, SoundExchange has still not received consent from the respective counterparties to produce the agreements to the Services in discovery.

As demonstrated below, it is well established that confidentiality provisions in a private contract are not a permissible basis for refusing to timely produce otherwise discoverable material. At best, such contractual restrictions may justify the imposition of a protective order to maintain the confidentiality of the agreements. In this case, however, such a protective order is already in effect. This same issue arose in the last PSS/SDARS proceeding, and Music Choice understands that it has arisen in every other recent sound

recording rate proceeding. In each instance, SoundExchange does not "object" to producing the documents, but merely refuses to produce them, forcing the opposing party to engage in wasteful motion practice to obtain an order from the Judges that should not have been necessary in the first place. The Judges, in every instance, have eventually ordered SoundExchange to produce the documents, without substantive opposition by SoundExchange, irrespective of whether third-party consent has been obtained. Thus, SoundExchange's refusal to produce the agreements in a timely fashion serves only one purpose, which is to minimize Music Choice's ability to use this necessary discovery within the very short discovery period set by statute.

In light of the above, Music Choice respectfully requests an order compelling SoundExchange to promptly produce all documents withheld solely on confidentiality grounds. Additionally, because SoundExchange has repeatedly withheld documents on this ground, Music Choice also requests a standing order preventing SoundExchange from withholding in the future otherwise discoverable documents based solely upon confidentiality restrictions related to those documents. Neither Music Choice nor the Judges should be forced to repeatedly engage in the same "Groundhog's Day" motion practice during every phase of every proceeding. Finally, to the extent SoundExchange fails to timely produce such documents, Music Choice requests an order precluding SoundExchange from introducing or otherwise using such documents at trial.

ARGUMENT

I. OTHERWISE DISCOVERABLE DOCUMENTS MUST BE PRODUCED REGARDLESS OF CONFIDENTIALITY AGREEMENTS WITH THIRD PARTIES

A. The Documents at Issue are Discoverable and Highly Relevant

The discovery standard governing this proceeding authorizes a participant to request non-privileged documents that directly relate to the written direct statement of an opposing participant. *See* 17 U.S.C. § 803(b)(6)(C)(v); 37 C.F.R. § 351.5(b). The statute and regulations make clear that a party's written direct statement includes witness statements, exhibits, designated testimony from prior proceedings, and the party's rate proposal. *See* 17 U.S.C. § 803(b)(6)(ii)(II); 37 C.F.R. § 351.4(b).

There is no question that the agreements and other documents at issue are discoverable and directly related to SoundExchange's expert testimony. Each is a document that was explicitly relied upon by one or more SoundExchange witnesses in preparing their written testimony in this proceeding. The documents sought by this motion comprise specific agreements between Record Companies and Digital Music Services upon which SoundExchange's experts Dr. Janusz Ordover and Dr. George Ford relied in forming the opinions expressed in their written testimony. Indeed, Drs. Ordover and Ford present many of these agreements as benchmarks in support of SoundExchange's rate proposal. Dr. Ordover states that such agreements, which he posits reflect "rates arising from voluntary transactions in a competitive marketplace," are of "significant probative value for purposes of setting appropriate licensing rates for the digital distribution of sound recordings by Sirius XM." *See* Written Direct Testimony of Janusz Ordover at ¶ 26. Likewise, Dr. Ford utilizes the benchmark approach in his analysis to reach his conclusions on the rate to be paid by Music Choice; in so doing, he expressly states that he relied upon the same agreements

considered by Dr. Ordovery, and reviewed "the royalty rates of numerous marketplace agreements between record companies and copyright users offering digital transmissions of sound recordings." See Written Direct Testimony of George S. Ford at 14.

It would be highly prejudicial to the Services for SoundExchange to rely on these agreements in support of its fee proposal while at the same time refusing to produce them so that Sirius XM and Music Choice may perform their own analyses of Dr. Ordovery's and Ford's conclusions and cross-examine those witnesses properly at deposition and trial. Moreover, the requested documents are critical to the Judges' determination of whether the agreements, in their totality, support or contradict SoundExchange's position in this rate-setting proceeding. Given SoundExchange's heavy reliance on this expert testimony, it will be impossible to make a determination of the reasonableness of SoundExchange's proposals without a complete and clear understanding of its experts' testimony and all the materials upon which those experts relied. The Judges should have complete evidence concerning the data and documents reviewed by SoundExchange's experts in reaching their conclusions, including in particular the requested agreements. Without such documents, the Judges' ability to set a fair and reasonable rate in this proceeding will be substantially impaired.

SoundExchange acknowledges that each one of these documents must be produced as part of its initial disclosures pursuant to the operative Discovery Schedule and does not object to producing any of these documents on any grounds other than the confidentiality provisions in the agreements.

B. The Existence of Confidentiality Agreements With Third Parties Do Not Prevent the Disclosure of Otherwise Discoverable Documents.

As a preliminary matter, the regulations applicable to discovery in this proceeding do not contain any provision allowing a party to withhold discoverable documents due to private

confidentiality agreements or third party consent provisions contained in those agreements. This is not surprising, given that it is well established under the Federal Rules of Civil Procedure that privately negotiated confidentiality agreements do not provide a lawful basis to withhold production of otherwise discoverable material.

This issue frequently arises in contexts where a party seeks documents related to the settlement of a prior dispute, where the prior settlement agreement contains confidentiality provisions. In such instances, courts routinely hold that such private confidentiality restrictions do not trump the disclosing party's legal obligation to provide the requested discovery. For example, in *Burda Media, Inc. v. Blumenberg*, No. 97 Civ. 7167 (RWS), 1999 WL 413469 (S.D.N.Y. June 21, 1999), the defendant sought production of various documents relating to the plaintiff's settlement with a co-defendant. *Id.* at *3. The plaintiff refused to produce the settlement document on the ground, *inter alia*, that the settlement agreement contained a confidentiality provision. *Id.* The district court ruled that the privately negotiated confidentiality provision did not provide any lawful basis for the plaintiff to withhold the documents, noting that "[a]lthough the Settlement Agreement contains a confidentiality provision . . . litigants cannot shield otherwise discoverable information from disclosure to others by agreeing to maintain its confidentiality, and cannot modify the Federal Rules of Civil Procedure by stipulation." *Id.* See also *Trans. Alliance Bank, Inc. v. Arrow Trucking Co.*, No. 10-CV-016-GKF-FHM, 2011 WL 4964034 at *1 (N.D. Okla. Oct. 19, 2011) (rejecting argument that settlement agreement was not discoverable due to confidentiality clause in settlement agreement); *Griffin v. Mashariki*, No. 96 Civ. 6400 (DC), 1997 WL 756914 at *2 (S.D.N.Y. Dec. 8, 1997) ("[T]he mere fact that the settling parties agreed to maintain the confidentiality of part of the settlement . . . cannot serve to

shield that statement from discovery.”); *Tribune Co. v. Purchigliotti*, No. 93 Civ. 7222 (LAP)(THK), 1996 WL 337277, at *3 (S.D.N.Y. June 19, 1996) (“Finally, the mere fact that the settling parties agreed to maintain the confidentiality of their agreement cannot serve to shield it from discovery.”); *Bennett v. La Pere*, 112 F.R.D. 136, 140 (D.R.I. 1986)(“... litigants cannot so easily colloquy to screen themselves from the rigors of pretrial discovery.”). Similarly, neither SoundExchange nor its member record companies can modify SoundExchange’s discovery obligations by private stipulation with third parties. SoundExchange has a legal obligation to produce the documents at issue pursuant to the applicable regulations. That duty is independent of and pre-exists any specific order compelling discovery from the Judges, and cannot be ignored, modified or delayed based merely upon private agreements with third parties.

Numerous courts have similarly held that parties’ private agreements cannot trump their discovery obligations or otherwise provide a valid basis for withholding otherwise discoverable documents in contexts other than discovery into settlement agreements. For example, in *Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, 91 F.R.D. 84 (E.D.N.Y. 1981), the plaintiff sought discovery from non-parties of documents relating to a study containing economic analysis of the impact of an alleged price-fixing scheme. *Id.* at 86-7. The non-parties objected to producing documents concerning the study on the ground, *inter alia*, that the study was subject to various confidentiality agreements. *Id.* at 87. The district court rejected this argument, holding:

By themselves, the confidentiality agreements entered into by Nathan, DOD, RMI and TMICA do not immunize the Nathan report or other materials from discovery. . . . In short, [the cases cited by the objecting parties] cannot fairly be extended beyond their litigation contexts to permit parties to contract privately for the confidentiality of documents, and foreclose others from

obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position. To hold otherwise would clearly not serve the truth-seeking function of discovery in federal litigation.

Id. at 87-88. *See also Zoom Imaging, L.P. v St. Luke's Hosp. and Health Network*, 513 F. Supp. 2d 411, 417 (E.D.Pa. 2007) (rejecting argument that documents relating to employee interviews and surveys were not discoverable due to confidentiality agreements with survey company and employees); *Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559, 562 (S.D.N.Y. 1977) ("Such a clause in an agreement between defendants and Chase cannot preclude plaintiff from making a full inquiry into the assets of the judgment debtors. The scope of plaintiff's rights cannot be governed by agreement of his adversaries.").

As noted in several of the above-cited cases, a suitable protective order is sufficient to accommodate any legitimate concerns raised by the confidentiality provisions of the license agreements. Given that a robust protective order is already in place in this proceeding, SoundExchange has no lawful basis to delay or otherwise withhold production of these agreements.

II. SOUNDEXCHANGE SHOULD BE PRECLUDED, ON AN ONGOING BASIS, FROM WITHHOLDING OR DELAYING PRODUCTION OF OTHERWISE DISCOVERABLE MATERIAL BASED SOLELY ON CONFIDENTIALITY RESTRICTIONS IN PRIVATELY NEGOTIATED AGREEMENTS

As demonstrated above, the presence of privately negotiated confidentiality provisions in the record companies' license agreements does not allow SoundExchange to withhold production of those documents. Nonetheless, in this and other past proceedings, SoundExchange has withheld such documents, forcing its adversaries to seek and obtain the same order compelling discovery over and over again. Indeed, even though the various record companies provided these agreements to SoundExchange and its experts months ago for the purpose of drafting its written direct statement, those record companies did not begin

the process of seeking consent to produce the agreements to the Services until shortly before the discovery period began. Such conduct by SoundExchange needlessly wastes the resources of the Services and the Judges, and unfairly delays the Services' discovery efforts in an extremely short discovery period. Consequently, and in order to deter SoundExchange from continuing to engage in such conduct, Music Choice respectfully requests that the Judges issue a standing order, prohibiting SoundExchange for the remainder of this proceeding from withholding otherwise discoverable documents solely based upon confidentiality agreements with third parties, including any notice or consent provisions contained in those agreement.

III. TO THE EXTENT SOUNDEXCHANGE WITHHOLDS DOCUMENTS IN VIOLATION OF THE REQUESTED ORDER, SOUNDEXCHANGE SHOULD BE PRECLUDED FROM RELYING UPON THOSE DOCUMENTS

As demonstrated above, the requested documents are highly relevant and critical to the evaluation of SoundExchange's rate proposal. The burden imposed on SoundExchange to produce the requested documents is minimal as compared to their high probative value. It is clear that the requested agreements are uniquely in the possession, custody or control of either SoundExchange or its member Record Companies; Drs. Ordovery and Ford's written direct testimony indicates that they were provided with such agreements for purposes of preparing their opinions in this proceeding. Sirius XM and Music Choice will have no other means to review the documents unless SoundExchange is compelled to produce them, and to do so expeditiously in light of their obligations under the initial-disclosures provisions of the Discovery Schedule. Absent such production, the Judges should preclude SoundExchange from relying on the Digital Music Service agreements upon which Drs. Ordovery and Ford relied in support of SoundExchange's fee proposal. *C.f.* Fed. R. Civ. P. 37(c)(1) (providing that a party who fails to make proper disclosures "is not allowed to use that information . . . to supply evidence on a

motion, at a hearing, or at a trial").

CONCLUSION

For the foregoing reasons, Music Choice respectfully requests that the Copyright Royalty Judges (1) compel SoundExchange to produce, within three business days, all license agreements and other documents it is withholding solely on confidentiality grounds and (2) issue a standing order applicable to the remainder of this proceeding that any documents subject to confidentiality restrictions that are otherwise discoverable be produced without delay, irrespective of whether third-party consent has been requested or received; and (3) preclude SoundExchange from using any documents at trial that it withholds in violation of these orders.

Dated: January 13, 2012

Respectfully submitted,

Music Choice

By: 

Paul M. Fakler (NY Bar No. 7940435)
Martin Cunniff (DC Bar No. 424219)
Eric Roman (NY Bar No. 2827657)
Matthew Trokenheim (NY Bar No. 4416079)
Jeff Leung (NY Bar No. 4640819)
ARENT FOX LLP
1675 Broadway
New York, NY 10019-5874
Tel: 212.484.3900
Fax: 212.484.3990
fakler.paul@arentfox.com
Attorneys for Petitioner
Music Choice

EXHIBIT A

Initial Disclosures for Which SoundExchange Has Sought But Not Received Consent

LICENSOR	LICENSEE	DESCRIPTION
UMG	Alltel Communications, LLC	Amendments to Ringback Agreement
WMG	Alltel Communications, LLC	Ringback Agreement
WMG	Altnet	Subscription Services Agreement
WMG	Apple Computers, Inc.	Digital Music Download Agreement and Related Amendments, Ringtone Letter Agreements, Cloud Service Agreement
WMG	AT&T Mobility, LLC	Digital Music Download Agreement
UMG	Boost	Amendment to Wireless Internet Service Agreement
UMG	Claro	Contract for Contract Service Provider and Related Amendment
UMG	ClearSky Mobile Media, Inc. (formerly Preferred Voice)	Amendments to Mobile Products Agreement
Sony	Dada.net S.p.A.	Letter of Intent re Contract Agreement and Related Amendment
UMG	Gbox (fka Navio)	Amendment to Permanent Download Service Agreement
UMG	MCNE	Permanent Download Service Agreement and Related Amendments
UMG	Microsoft	Amendments to Subscription Services Agreement and Payment Statements
WMG	Microsoft	Digital Music MP3 Download Agreement and Payment Statements
WMG	Mobile Streams, Inc.	Hi-Fi Ring Tone Aggregator Agreement and Related Amendments
UMG	MOG, Inc.	Subscription Services Agreement, Related Amendments, and Payment Statements
WMG	MOG, Inc.	Subscription Services Agreement, Related Amendments, and Payment Statements
UMG	MPO Corp. d/b/a Musicane	Permanent Download Service Agreement and Related Amendments
UMG	mSpot	Mastertone Agreement and Related Amendments

WMG	MyPlay Direct	MP3 Download Agreement and Related Amendments
WMG	Myxer	MP3 Download Agreement
UMG	Napster	Payment Statements
WMG	Napster	Payment Statements
UMG	Passionato	Digital Distribution Agreement
UMG	Project Playlist, Inc.	Online Streaming and Conditional Download Service Agreement and Related Amendments
UMG	RealNetworks	Digital Distribution Agreement
EMI	Rhapsody International Inc.	Amendments to the Streaming Audio and Conditional Download Agreement and Payment Statements
UMG	Rhapsody International Inc.	Subscription Services Agreement, Related Amendments, and Payment Statements
WMG	Rhapsody International Inc.	Payment Statements
WMG	Slacker	Payment Statements
EMI	Spotify Ltd.	Payment Statements
UMG	Spotify Ltd.	Audio Streaming and Conditional Download Agreement and Payment Statements
WMG	Sprint Spectrum LP d/b/a Sprint PCS	HiFi Ring Tone Agreement, Ring Back Tone Agreement, Digital Music Download Agreement, and Related Amendments
WMG	T-Mobile USA, Inc.	Hi Fi Ring Tone Agreement and Related Amendments
WMG	Zed (formerly 9 Squared)	HiFi Ring Tone Aggregator Agreement, Ring Back Tone Agreement, and Related Amendments
n/a	n/a	Charts Summarizing Agreement Terms and Payment Information for Services (Prepared for the Written Direct Testimony of Janusz Ordover and George S. Ford)

CERTIFICATE OF SERVICE

I, Martin Cunniff, do hereby certify that copies of the foregoing Music Choice's Motion to Compel SoundExchange to Produce License Agreements and Other Documents Withheld on Confidentiality Grounds was sent via electronic mail on the 13th day of January, 2012 and Federal Express on the 13th day of January, 2012, to the following:

<p>R. Bruce Rich Bruce S. Meyer Todd D. Larson WEIL, GOTSHAL & MANGES LLP 767 Fifth Avenue New York, New York 10153 Fax: (212) 310-8007 r.brucc.rich@weil.com bruce.meyer@weil.com todd.larson@weil.com Counsel for Sirius XM Radio, Inc.</p>	<p>David A. Handzo Michael B. DeSanctis Jared O. Freedman Garret Levin JENNER & BLOCK LLP 1099 New York Ave., N.W. Washington, D.C. 20001 dhandzo@jenner.com mdesantctis@jenner.com jfreedman@jenner.com glevin@jenner.com Counsel for SoundExchange, Inc.</p>
<p>Patrick Donnelly Sirius XM Radio Inc. 1221 Avenue of the Americas, 36th Floor New York, New York 10020 Fax: (212) 584-5200 patrick.donnelly@siriusxm.com</p>	<p>Michael J. Huppe C. Colin Rushing SoundExchange (SX) 1121 14th Street, N.W., Suite 700 Washington, D.C. 20005 Fax: (202) 640-5883 mhuppe@soundexchange.com crushing@soundexchange.com</p>

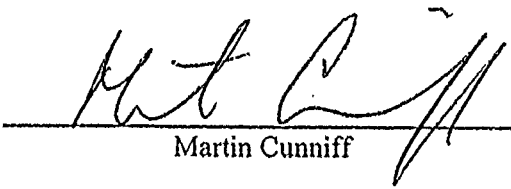
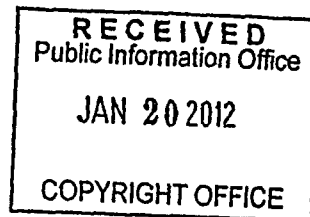

Martin Cunniff

EXHIBIT 4

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.



In the Matter of:

Determination of Rates and Terms for
Preexisting Subscription Services and
Satellite Digital Audio Radio Services

Docket No. 2011-1
CRB PSS/Satellite II

**SOUNDEXCHANGE'S OPPOSITION TO MUSIC CHOICE'S MOTION TO COMPEL
SOUNDEXCHANGE TO PRODUCE LICENSE AGREEMENTS AND OTHER
DOCUMENTS WITHHELD ON CONFIDENTIALITY GROUNDS**

SoundExchange hereby respectfully responds to Music Choice's Motion to Compel
SoundExchange to Produce License Agreements and Other Documents Withheld on
Confidentiality Grounds (Jan. 13, 2012) (the "Motion").

Introduction

Music Choice seeks to compel SoundExchange to produce certain licensing agreements and related payment documents between record companies and digital music services that were relied on in preparing some of SoundExchange's witnesses' written testimony.¹ As set forth below, SoundExchange has withheld production of these documents because the agreements require third-party consent or a court order before they may be disclosed. SoundExchange has sought, but not obtained, that third-party consent. Accordingly, a court order is necessary before

¹ Music Choice's Motion relies on 17 U.S.C. § 803(b)(6)(C)(v)-(vi) and 37 C.F.R. § 351.5(b)-(c). But subsections 803(b)(6)(C)(vi) and 351.5(c) – which allow motions to compel documents and information where the Judges' resolution of the proceeding would be "substantially impaired" if the documents and information were not produced – are not in effect in this proceeding, which commenced on January 5, 2011. See § 803(b)(6)(C)(vi)(II) ("This clause shall not apply to any proceeding scheduled to commence after December 31, 2010"); § 351.5(c) ("In any royalty rate proceeding scheduled to commence prior to January 1, 2011, a participant may, by means of written or oral motion on the record, request of an opposing participant or witness other relevant information and materials."). The other subsections cited by Music Choice remain effective for this proceeding.

the agreements may be produced. If this Court orders SoundExchange to produce the documents, SoundExchange will comply with the order.

Background

The parties to this proceeding, including Music Choice, jointly submitted a proposed Discovery Schedule, which this Court adopted on January 3, 2012. The Discovery Schedule required the parties to produce as "Initial Disclosures" documents that witnesses relied upon in preparing their written testimony, "*except where third party consent or a court order is required before documents relied upon can be produced.*" (Emphasis added.) In that circumstance, this Court required the parties to seek consent prior to January 9, 2012, and to inform the other parties of the identity and/or nature of the documents by that date.

SoundExchange timely complied with these requirements. *First*, SoundExchange has produced the documents its witnesses relied upon where consent was not necessary or where consent has been granted. Indeed, SoundExchange produced over 10,000 pages of documents as Initial Disclosures, which is more than either of the other parties. *Second*, in compliance with the Court's Discovery Schedule, prior to the January 9, 2012 date for exchanging Initial Disclosures, SoundExchange sought third-party consent where consent or a court order was required before the documents could be produced. Some third parties provided consent, and SoundExchange produced those agreements. However, some third parties did not consent. Accordingly, consistent with the Discovery Schedule, SoundExchange provided Sirius XM and Music Choice with a list of the documents for which consent was sought but not obtained (which is attached as Exhibit A to the Music Choice's Motion).²

² In preparing this response, counsel for SoundExchange determined that there are two agreements that were inadvertently omitted from the list provided to Music Choice and Sirius XM on January 9, 2012. These agreements are a HiFi Ring Tones Agreement and Related Amendment between WMG and Myxer and a Ring Back Tone Agreement between WMG and AT&T Mobility. SoundExchange has sent letters to those licensees seeking consent.

Discussion

I. SoundExchange Has Complied Fully With the Judges' Discovery Schedule and Will Produce the Withheld Documents If Ordered to Do So.

Music Choice tries to ascribe improper motives to SoundExchange's non-production of documents. Motion at 2-3, 8-9. But there is nothing improper about honoring contractual agreements. SoundExchange has complied with the Scheduling Order that the parties jointly proposed to the Court and that the Court adopted. Indeed, before the parties agreed to jointly propose the Scheduling Order to this Court, SoundExchange informed Music Choice and Sirius XM that its Initial Disclosure documents included agreements that required third-party consent or a court order before they could be produced. Having been informed of those facts, Music Choice agreed to the proposed Scheduling Order, which allowed SoundExchange to proceed in exactly the manner described herein

If this Court orders SoundExchange to produce the documents for which consent has been sought but not obtained, then SoundExchange will comply with the Court's Order and produce the documents. That is precisely how the same issue has been resolved in prior proceedings before the Copyright Royalty Judges when services and SoundExchange have withheld documents on this basis. *See, e.g., Order Granting the Motion of SoundExchange to Compel RealNetworks to Produce Documents*, at 2, Docket No. 2009-1 CRJ Webcasting III (Mar. 3, 2010) (ordering RealNetworks to produce documents that its witnesses relied on but the disclosure of which was withheld due to the lack of consent from third parties); *Order on Motion by DiMA et al to Compel SoundExchange to Produce Documents Related to the Testimony of Barrie Kessler*, at 2, Docket No. 2005-1 CRB DTRA (Nov. 7, 2006) (ordering SoundExchange to produce documents it relied on where SoundExchange otherwise lacked authority to do so).

Furthermore, in this proceeding, Sirius XM has withheld Initial Disclosures on the very same basis as SoundExchange. When the parties exchanged Initial Disclosures on January 9, 2012, Sirius XM provided a list of agreements that its witnesses relied on in preparing their written testimony but that Sirius XM withheld from production on the ground that the disclosure of those documents required third party consent or a Court order. There is no difference between the conduct of SoundExchange and Sirius XM in this regard. Sirius XM has informed SoundExchange that it may be able to obtain consent for those agreements and thus be able to produce them without the need for a Court order. To date, however, Sirius XM has not produced all of those documents. Accordingly, SoundExchange anticipates that it may need to file a motion to compel those documents from Sirius XM shortly.

II. Music Choice's Cited Cases Are Inapposite.

Music Choice cites to a number of federal district court cases regarding the discoverability of documents that are subject to confidentiality agreements. *See* Motion at 5-8. Those cases are not on point. In those cases, the confidentiality provisions at issue were drafted for the purpose of shielding information from discovery in ongoing litigation.³ But that is not the case with respect to the agreements that SoundExchange has withheld. The agreements at issue here were negotiated by record companies in the ordinary course of business, outside the context

³ *See, e.g., Burda Media, Inc. v. Blumenberg*, No. 97 Civ. 7167 (RWS), 1999 WL 413469 at *3-4 (S.D.N.Y. June 21, 1999) (ordering the production, to non-settling defendants, of a settlement agreement between a plaintiff and co-defendant in ongoing litigation); *Trans. Alliance Bank, Inc. v. Arrow Trucking Co.*, No. 10-CV-016-GKF-FHM, 2011 WL 4964034 at *1-2 (N.D. Okla. Oct. 19, 2011) (ordering the production, to a non-settling defendant, of a settlement agreement between a plaintiff and co-defendant in ongoing litigation solely for the purpose of testing the settling defendant's "bias and credibility"); *Griffin v. Mashariki*, No. 86 CIV. 6400(DC), 1997 WL 756914 at *2 (S.D.N.Y. Dec. 8, 1997) (ordering production of settlement with co-defendant in part because of possibility that the settlement "may well be impeachment material" against the settling defendant); *Tribune Co. v. Pucigliotti*, No. 93 Civ. 7222(LAP) (THK), 1996 WL 337277 at *2-3 (June 19, 1996) (ordering production of "settlement-related documents primarily for their impeachment value" in connection with settling co-defendant); *Bennett v. LaPere*, 112 F.R.D. 136, 140 (D.R.I. 1986) ("Whatever suppressive effect the confidentiality clause may have as between the [settling parties], it cannot be allowed to bar the nonsettling defendant's right to inquire into the settlement."); *see also Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559, 562 (S.D.N.Y. 1977) (ordering production of settlement agreement from different dispute because the confidentiality clause would have prevented discovery into the plaintiff's "adversaries").

of this proceeding, and the presence of confidentiality provisions in these agreements is intended to protect the contracting parties' sensitive business information, not to hide relevant information from a settling co-defendant in litigation.

The other cases cited by Music Choice are also inapposite. Unlike the confidentiality provisions in the agreements at issue in *Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, 91 F.R.D. 84 (E.D.N.Y. 1981), for example, the agreements at issue here do not contain blanket restrictions prohibiting either party from making use of the agreement in "any litigation which might arise" between the contracting parties. *See id.* at 87. Rather, and keeping in mind that each record company's agreements are different, the confidentiality provisions in the documents at issue generally allow for some use of the documents and disclosure with consent or subject to appropriate court orders.

Moreover, SoundExchange is not claiming that it *cannot* under any circumstances produce the documents because of the presence of the confidentiality provisions, as the plaintiffs apparently claimed in *Zoom Imaging, L.P. v. St. Luke's Hospital and Health Network*, 513 F. Supp. 2d 411, 417 (E.D. Pa. 2007). Rather, SoundExchange has sought to comply with the contractual provisions that generally require the consent of the parties or a court order before the agreements can be disclosed in discovery.

III. The Judges Should Not Enter a Standing Order Directed Solely Toward SoundExchange.

Music Choice asks this Court to enter a standing order directed solely to SoundExchange that would prohibit SoundExchange "for the remainder of this proceeding from withholding otherwise discoverable documents solely based upon confidentiality agreements with third parties, including any notice or consent provisions contained in those agreement[s]." Motion at 9.

As explained above, both SoundExchange and Sirius XM have withheld documents that were relied upon by their witnesses because of the need to obtain third-party consent. In addition, as this proceeding moves forward, there may be other documents sought in discovery from each of the parties that are subject to contractual non-disclosure provisions. It would be entirely unfair to single out SoundExchange for different discovery rules than apply to the other parties. To the extent that the Court enters a standing order requiring the production of otherwise discoverable documents without regard to any confidentiality agreements with third parties, such an order should apply to all parties equally, not to SoundExchange alone.⁴

Finally, Music Choice's request that SoundExchange should be precluded from relying on the agreements relied on by Drs. Ordoover and Ford at trial if SoundExchange fails to produce such agreements despite being compelled by the Judges is entirely speculative and premature, and should be denied. SoundExchange has indicated that if ordered to produce the documents at issue, it will do so promptly. If such production does not occur, Music Choice would be free to seek appropriate relief, but to make such a ruling now would be premature and unnecessary.

Conclusion

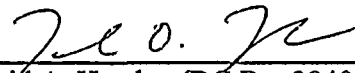
For the foregoing reasons, SoundExchange has complied with this Court's Discovery Schedule and will produce the withheld documents that its witnesses relied on if ordered to do so by this Court.

⁴ Although Music Choice now complains about a waste of resources by the Services and Judges created by the withholding of documents in the absence of consent, *see* Motion at 9, neither Music Choice nor Sirius XM suggested the possibility of seeking such a standing order during the parties' negotiations of the joint discovery schedule. In light of the fact that two of the three parties have already needed to withhold documents because of a lack of third party consent, a joint motion to adopt such an order applicable to all parties could have been potentially negotiated. Instead, Music Choice has filed the present motion ignoring entirely the fact that Sirius XM has withheld documents for the same reason as SoundExchange — a lack of third party consent.

Respectfully submitted,

C. Colin Rushing (DC Bar 470621)
General Counsel
SoundExchange, Inc.
1121 14th Street, N.W., Suite 700
Washington, D.C. 20005
(v) 202-640-5858
(f) 202-640-5883
crushing@soundexchange.com

Of Counsel

By 
David A. Handzo (DC Bar 384023)
Michael B. DeSanctis (DC Bar 460961)
Jared O. Freedman (DC Bar 469679)
Garrett A. Levin (DC Bar 977596)
David Z. Moskowitz (DC Bar 994469)
JENNER & BLOCK LLP
1099 New York Ave., N.W., Suite 900
Washington, D.C. 20001
(v) 202-639-6000
(f) 202-639-6066
dhandzo@jenner.com
mdesantis@jenner.com
jfreedman@jenner.com
glevin@jenner.com
dmoskowitz@jenner.com

Counsel for SoundExchange, Inc.

January 20, 2012

CERTIFICATE OF SERVICE

I, Garret A. Levin, do hereby certify that copies of the foregoing opposition were sent via electronic mail and First Class mail on the 20th day of January, 2012, to the following:

<p>R. Bruce Rich Bruce S. Meyer Todd D. Larson WEIL, GOTSHAL & MANGES LLP 767 Fifth Avenue New York, New York 10153 Fax: (212) 310-8007 r.bruce.rich@weil.com bruce.meyer@weil.com todd.larson@weil.com</p> <p><i>Counsel for Sirius XM Radio Inc.</i></p>	<p>Paul M. Fakler Eric Roman ARENT FOX LLP 1675 Broadway New York, New York 10019-5874 Fax: (212) 484-3990 fakler.paul@arentfox.com roman.eric@arentfox.com</p> <p><i>Counsel for Music Choice</i></p>
--	--



Garrett A. Levin

EXHIBIT 5

Choudhury, Anjan

From: Larson, Todd <Todd.Larson@weil.com>
Sent: Monday, October 13, 2014 3:13 PM
To: Choudhury, Anjan; Ehler, Rose
Cc: Perelman, Sabrina
Subject: Initial disclosures

Anjan and Rose,

I wanted to let you know that with respect to the initial disclosures related to the testimony of Pandora witness Steve McBride, there is certain confidential Nielsen/Soundscan data underlying the promotion experiments he describes that Pandora cannot produce given certain confidentiality restrictions imposed on the data by Nielsen. We are working to produce a set of underlying worksheets, computer code, and the like without the Soundscan data in it, and will produce those docs as quickly as we can. As to the Soundscan data (and the underlying work product containing that data), can we have a call to discuss the confidentiality issues and how we might resolve them?

Thanks,

-Todd



Todd Larson
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
todd.larson@weil.com
+1 212 310 8238 Direct
+1 347 306 3344 Mobile
+1 212 310 8007 Fax

The information contained in this email message is intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by email, postmaster@weil.com, and destroy the original message. Thank you.

EXHIBIT 6

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DETERMINATION OF ROYALTY RATES
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (*WEB IV*)

)
)
)
) Docket No. 14-CRB-0001-WR
) (2016-2020)
)
)
)

TESTIMONY OF BRETT DANAHER
Professor of Economics, Wellesley College

I. QUALIFICATIONS

1. My name is Brett Danaher. I hold my PhD in Applied Economics from the Wharton School at the University of Pennsylvania, and I am currently a tenure track professor of Economics at Wellesley College. My research has focused on the digitization of the media industries and the challenges and opportunities that this has presented to firms and governments. My work is largely empirical, and I have been published in four different top peer-review journals; I have also written book chapters for National Bureau of Economics Research volumes. I have consulted for and worked closely with a major music label and the International Federation of the Phonographic Industry ("IFPI"), the Motion Picture Association of America and several major motion picture studios, a television network, and several other firms involved with digital media or copyright protection. My C.V. is attached as Appendix A.

II. BACKGROUND AND SUMMARY

2. I understand that a primary objective of the Copyright Royalty Board ("CRB") in setting royalty rates for non-interactive webcasters is to identify the rate to which a willing buyer

and willing seller would agree. I understand that, in identifying the rates a willing buyer and willing sellers would negotiate, Congress has directed the CRB to consider “whether the use at issue might substitute for, promote, or otherwise affect the copyright owners’ stream of revenues.” But to date there is no clear evidence (at least of which I’m aware) of the degree to which consumption of music through webcasting services substitutes for other forms of music consumption, such as digital downloads via iTunes, Amazon Digital Music Store, or sales of CDs or other physical media. In fact, it is possible that webcasting is actually an economic complement to paid digital downloads (that is, a decline in the price of webcasting, which increases the use of webcasting, could cause an increase in other music purchases). There are several reasons to expect that this could be the case:

- a) Webcasting may expose individuals to music they would not have otherwise heard, connecting consumers with products that they would be willing to buy but would not otherwise have been aware of.
- b) Even if a consumer is aware of a song, a common problem with music and other “experience goods”¹ is that consumers cannot know the value of the good until they have experienced it and thus can’t make an informed purchase decision. Webcasting allows sampling of music and thereby helps enable consumers to value the good.
- c) In the case of non-interactive services like Pandora and iHeartRadio (but unlike interactive services like Spotify,² and Soundcloud), webcasting is very much an imperfect substitute for purchasing music. When music is purchased, or with interactive services, the consumer can listen to any song she owns at any time. On non-interactive webcasting services, despite some customization, songs and ordering are chosen by a DJ

¹ Experience goods are goods whose characteristics (and thus their appeal) are known to the consumer only after consumption. The principles of such goods, and market problems associated with them, were first documented in Nelson, P., 1970. “Information and Consumer Behavior,” 78(2) *Journal of Political Economy*, pp. 311-329.

² Some interactive services like Spotify also offer a more radio-like, non-interactive service such as Spotify radio. An important difference with these services is that at any time, the user can stop the radio service and choose to listen to any song she desires, unlike on Pandora and iHeartRadio.

or an algorithm (and are not known to the user in advance) and the potential for instantly hearing the song one wants is unavailable.

3. There exists very little empirical research on the impact of webcasting services on music purchasing behavior. I summarize that literature in section V. To the extent the existing literature has addressed this question, it tends to treat all webcasting services as a whole despite these strong theoretical reasons to think that non-interactive webcasting services might have a different impact on purchasing behavior than would interactive services. I was asked by counsel for iHeartMedia to analyze webcasting's impact on the market for digital downloads from an economic perspective using available economic data.

4. Specifically, I analyze the effect that increased use of webcasting has on purchasing behavior. Based on a robust data set, my main conclusion is that use of non-interactive webcasting services has a significantly more positive (or less negative) impact on digital song purchases than interactive webcasting services. This difference is well-identified and statistically significant at the 95% confidence level.

5. Separately, I also find evidence that non-interactive webcasting has a net positive impact on digital purchasing (90% confidence) and that interactive webcasting has a net negative impact on digital purchasing (99% confidence), although these results on the absolute impact of these services on purchasing are less well-identified than the former conclusion regarding the relative impact of these services. Based on my sample, I find that adoption of non-interactive webcasting services causes individuals to purchase 6 more songs on average than they would have otherwise bought, whereas adoption of interactive webcasting services causes individuals to purchase 15 fewer songs on average than they would have otherwise bought. All of these results are consistent with economic theory. Thus, my findings support the conclusion that, although interactive webcasting services may substitute for other forms of music purchasing, non-

interactive webcasting services substitute significantly less, if at all, and are less likely to lead to a decline in the market for digital downloads. They may even increase the size of this market.

III. DATA

6. The data for this study were provided by an anonymous Internet consumer panel tracking company, hereafter referred to as Tracker.³ Tracker data come from a large, demographically representative sample of users who allow a small program to run in the background on their computers that enables Tracker to monitor things like visits to websites plus duration there, time spent using webcasting services, digital music purchases, etc. The data we received from Tracker are a portion of their US sample. They contain observations for 15,000 web users in each of six months, from November 2013 to April 2014. The sample was selected to include a large number of users with varying degrees of webcasting usage as well as a small sample of users with no webcasting usage. No other selection criteria were used to choose the sample from Tracker's panel. Appendix B provides further detail regarding the Tracker data used in my analysis.

IV. REGRESSION ANALYSIS

7. To measure the impact of webcasting on music purchasing, one approach would be an econometric model that performs a regression analysis comparing (by individual) the number of songs purchased with the time spent on non-interactive and interactive webcasting services, respectively, controlling for other variables that are likely to affect such purchasing.

³ I regularly use Tracker data in my academic research. In my experience working with media data, Tracker produces high quality, accurate data, and they are an industry leader in tracking computer use at the individual level. Their data are regularly purchased by major media firms. The trends I observe in the Tracker data also agree with what I know to be true about the music industry in terms of seasonal patterns and correlations between modes of usage, giving me further reason to trust the data. My contract with Tracker prohibits me from revealing their name.

This approach is susceptible to bias,⁴ however, and I therefore needed to develop a more sophisticated methodology that more accurately captured the effect of webcasting services on music purchasing.

8. My analysis begins with the observation that non-interactive webcasting services like Pandora and interactive webcasting services like Spotify are growing in the U.S. Every month, there are individuals who begin using these services for the first time, having been previously unaware of these services or at least how much utility they would receive from using them. If some individuals are not using these services and then “discover” them – for example, through advice from a friend or an advertisement online – then their subsequent uptake of these services can be viewed as a “random shock” to their webcasting use caused by the discovery event, and for that reason, the change in their music purchasing behavior can be causally linked to webcasting.

9. This does not necessarily mean that they had never heard of the service before. Rather, the assumption is that they had never used the service and some random event, like a friend’s advice, tipped them over to using the service. Of course, just because an individual is observed not using a site like Pandora for one month does not mean that she has never used it before and has not already “discovered” it. She may have been on vacation or simply not had a

⁴ Specifically, the problem with this approach is that, even including controls for visits to music interest sites and demographics, it is likely that there are unobserved variables (based on a users’ taste for music, for example) that would be correlated with both webcasting usage and digital purchasing behavior, and it is not obvious how to control for such variables. A possible improvement would be a panel method that specifically asks if an individual, in months where that individual uses webcasting services more, purchases more or less music (as compared to changes in other consumers). But again, if an individual’s taste for music is changing over time, this model would still be biased toward finding positive impacts of both interactive and non-interactive webcasting services on purchasing behavior. Indeed, I have run these models and mostly found positive coefficients on all the variables of interest, but as they are biased in a positive direction they are not worth reporting. These models would also be biased by the measurement error in time spent on each of these services.

taste for music that month. However, what if an individual is observed not using a service for the first three consecutive months in the data? In a situation like this, it seems more reasonable to assume that this individual was not previously a user of the service and that most of the time, if we see the user start to use the service in the second three months, this represents a "discovery" event.

10. We can partly test whether these adoptions are really discovery events unrelated to changing music taste. I observed 15,000 individuals with varying degrees of non-interactive webcasting usage. Certainly I do observe in the data some individuals who are using non-interactive webcasting early on but who eventually stop. However, do they come back? In other words, if three or more months of non-usage followed by a month with usage indicates a discovery event (and not just changing taste in music), then I should rarely observe users who start using the service, leave it for three months, but come back.

11. Assume that if one uses a webcasting service for more than 15 minutes in a given month, one is considered a webcasting user for that month.⁵ In the data, I observe 2,765 individuals who used a webcasting service in the first month but then did not use it in months two, three, or four. In other words, these individuals started as webcasting users but "left" the service. Of these individuals, only 131 of them are observed as webcasting users in months five or six. In other words, of those who leave the service for three months or more, only 5% of them are observed coming back in my data. This fact is consistent with the assumption that if a user is observed with no webcasting use in the first three months, she probably has not been a user before (at or at least not for a long time), and if I observe her using webcasting services after

⁵ I choose 15 minutes as a cutoff because I sometimes observe an individual with a few moments on Pandora in a given month. It seems incorrect to believe that this indicates they really used the service in any meaningful manner. However, results are generally similar if I choose another cutoff like 10 or 30 minutes (no more than 10% come back).

that, it is reasonable to interpret that use as a random shock caused by “discovery” of the service (unrelated to tastes for music). If adoption of webcasting was largely driven by changing taste for music, I should see individuals regularly dropping out of webcasting usage and coming back. This does not appear to be the case.

12. I thus divide the dataset into two periods where period 1 refers to the first three months and period 2 refers to the second three months. I aggregate the data for each individual to the period level, summing up minutes listening to non-interactive and interactive services, music purchases, and control variables for the period. I then limit the sample to only individuals who have no non-interactive webcast usage in period 1 and who are observed purchasing a song at least once.⁶ I can then compare the change in purchases in the second period (relative to the first period) for the people who “discover” and start using non-interactive webcast services in the second period to the change in purchases for a “control” group who do not discover these services in period 2.⁷ Thus, the “control” group who never uses non-interactive services tells me the natural or seasonal trend for music purchasing behavior and sets a baseline, which I can then compare to the change in purchases of people who begin to use non-interactive services in period 2.⁸ Importantly, and as shown in Appendix C, people who adopt webcasting services

⁶ Individuals with no purchases in any period make up 90% of the data. If I included them, all the variance in the right hand variables would appear to have no impact, biasing all coefficients toward 0. But individuals who have 0 propensity to purchase are of little interest in this study, and so I drop these users for this model.

⁷ In period 1, I consider an individual a non-user of webcasting only if they literally show 0 minutes of usage – this is to ensure that any subsequent usage is truly a new adoption. However, in period 2, I consider an individual a webcasting user if they use it for over 1 hour and a non-user otherwise. There are many individuals who show just a few minutes of webcasting use in a single month, but it seems unreasonable to call this an adoption and assume it could have any impact on purchasing. My results hold if I choose 90 minutes or 30 minutes as the cutoff to indicate an adoption of the service.

⁸ This econometric approach to infer causality in the case of a new technology diffusing across the population has been used in prior, peer-reviewed and published literature. Waldfogel, J. and

during this period are statistically similar to the people who do not, eliminating the worry that this group is different and might have different seasonal trends in behavior.

13. The results of my analysis are presented in the table below. Appendix C contains additional information regarding the model used to perform this analysis.

Table 1: OLS Regression Results

	(i)	(ii)	(iii)
Period 2	-3.008 (2.53)	0.043 (1.00)	-2.184 (3.05)
WebRadioUser * Period 2	5.952+ (3.45)		5.065 (3.99)
Streaming User * Period 2		-15.309* (3.61)	-10.147+ (6.17)
Streaming Time	-0.197* (0.07)		
Web Radio Time		0.708 (0.48)	
Music Site Visits	0.700+ (0.42)	0.862* (0.27)	1.540** (0.70)
Constant	11.084* (1.24)	11.106* (0.85)	10.308* (1.42)
Observations	588	2028	486
Users	294	1014	243
Users who discover in period 2	154	78	
R-squared	0.524	0.553	0.517

Standard errors in parentheses

+ significant at 10%; ** significant at 5%; * significant at 1%

14. The results in column (i) demonstrate the following. The estimate on the “period 2” variable indicates that, for users in my dataset who never adopted non-interactive services, purchases were down by approximately 3 songs in the second period. However, if a

L. Chen, 2006. “Does Information Undermine Brand? Information Intermediary Use and Preference for Branded Web Retailers.” *Journal of Industrial Economics*, Vol. 54, No. 4, pp. 425-449.

user discovered and began using non-interactive webcasting in period 2, then that user purchased approximately 3 more songs in period 2 than in period 1, which is an increase of approximately 6 songs over the control group. Thus, the results imply that adoption of non-interactive webcasting services, if seen as a random shock of discovery, caused individuals to buy 6 more songs than they would have otherwise bought. Although the restrictions to the sample to run this model bring the user base down to 294 users, the effect is statistically significant with 92% confidence.

15. In column (ii) the results for the interactive services adoption experiment are quite different. The coefficient for the treated users in the second period is negative and statistically significant with 99% confidence. It implies that when a user adopts interactive webcasting services in the second period, she purchases 15 fewer songs on average than if she had not adopted. Note that the coefficient for interactive services is negative while the coefficient for non-interactive services is actually positive.

16. One might ask whether the model truly teases out the causal impact of adopting webcasting services on purchasing behavior. Perhaps there are unobserved variables changing at the individual level driving both adoption of webcast services and the number of digital purchases? I believe this to be unlikely based on the fact that if these unobserved variables exist, they should be causing individuals to leave and come back to webcasting services regularly. But as pointed out earlier, when an individual uses webcasting services but then shows no use for three months, she is very rarely observed using them again (in the remaining two months of data). Still, I cannot completely rule out that these unobserved variables driving adoption could exist, and that they might not be random (thus adoption was not a discovery event), and that they cannot be fully controlled for by visits to music interest sites. This would bias the coefficients in the positive direction.

17. However, if such a bias exists, it should exist for both the interactive webcasting model and the non-interactive webcasting model as well. Thus, a comparison between the coefficients (a triple difference), would difference out the impact of these variables, assuming they have similar impacts on adoption of both services. In column (iii) of Table 1, I limited the sample to only those individuals who did not use any webcasting service – interactive or non-interactive – in period 1 and who also purchase at least 1 song. Thus, with this sample I am able to test both effects – adoption of non-interactive and interactive services – in the same model and compare the two effects using an F-test. The results show the following: the adoption of non-interactive services has a similar impact as in column (i), though with lower statistical significance due to reduced sample size. The adoption of interactive services in the more limited sample indicates a negative impact on purchases, though not as negative as in column (ii). Most importantly, a two-tailed f-test of the hypothesis that the two coefficients in column (iii) are actually equal was rejected at the 95% confidence level ($p\text{-value} = .04$). Thus, we can say with at least 95% confidence that non-interactive services have a greater promotional effect (or at least lower substitutional effect) on the digital download market than interactive webcast services. This is the strongest and most compelling result, as any remaining unobserved heterogeneity (from adoption decisions that are not random) should be similar for the two types of services, and thus differenced out of a comparison between the two coefficients.

18. In summary, in this original research I obtained six months of consumer level panel data to analyze the impact of non-interactive and interactive webcasting services on music purchasing. Using a standard econometric model, I found strong evidence that non-interactive webcasting services were more promotional (or, at a minimum, less substitutional) to digital downloads than interactive webcasting services, and that this difference was statistically

significant with 95% confidence. Viewing an adoption of a service (after three months of non-use) as a random discovery event (uncorrelated with changing taste for music), I also found that the adoption of non-interactive services has a positive impact on digital purchases (with 90% confidence) while the adoption of interactive services has a negative impact (with 99% confidence). Finding a more promotional/less substitutional effect for non-interactive services than interactive services is consistent with economic theory.

19. I believe that this represents the best available evidence to date on the impact of webcasting on purchasing behavior for digital downloads. It also is largely consistent with the limited prior literature on the topic, which I discuss in the next section.

V. RELATED LITERATURE

20. There is other literature related to the relationship between webcasting and purchasing behavior. Most of this literature either fails properly to analyze this relationship, or is consistent with my analysis here.

21. According to reports from the IFPI, digital downloads still account for about two-thirds of all digital music revenues in the world. Digital download revenues fell for the first time in 2013, by 2.1%.⁹ At the same time, revenues from webcasting services are growing. Similar trends are observed in the United States. This has led to various claims that webcasting is the cause for the decline in digital downloads.¹⁰ But these claims confuse correlation with causation, and I am not aware of any evidence that has shown empirically that the growth in webcasting is the cause of the decline in digital downloads. Moreover, as demonstrated in my analysis above, when discussing webcasting it is necessary to differentiate between non-

⁹ <http://www.ifpi.org/news/music-subscription-revenues-help-drive-growth-in-most-major-markets>.

¹⁰ See, for example, <http://www.forbes.com/sites/zackomalleygreenburg/2013/07/26/so-long-mp3-reports-reveal-rapid-growth-for-streaming/>.

interactive and interactive webcasting services, because they are capable of having – and, as I show, in fact do have – very different impacts on music purchasing behavior.

22. A few researchers have previously attempted to empirically estimate the impact of particular webcasting services on digital downloads, although none of these working papers have yet been published in peer-reviewed journals.

23. Researchers in France used a survey of 2000 representative French consumers to argue that use of streaming sites like Spotify and YouTube had a positive impact on digital downloads, though it is unclear to me that their instrumental variable methodology was appropriate, and I suspect their results were biased to be positive.¹¹

24. Economists at the European Commission used Clickstream data to analyze the impact of streaming on sales, though they measured streaming through clicks on streaming sites and purchases through clicks on digital download websites.¹² They found a very small positive impact of streaming on purchasing, but nowhere does their paper mention what they consider as streaming sites, so I do not know if non-interactive webcast services were considered or if only sites like Spotify and Soundcloud were considered. My research adds to theirs by examining the differential effects of non-interactive versus interactive services, as well as using the “adoption event” as an exogenous shock to webcasting – something they did not do. Also, I measure actual digital downloads, not clicks on digital download sites.

¹¹ The researchers used an instrumental variable that I believe would not satisfy the exclusion restriction required for IV regression to isolate a causal effect. DangNguyen, G., S. Dejean, and F. Moreau 2012. “Are Streaming and Other Music Consumption Modes Substitutes or Complements?” Working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025071.

¹² Aguiar, L, and B. Martins 2013. “Digital Music Consumption on the Internet: Evidence from Clickstream Data.” Working paper available at <http://ipts.jrc.ec.europa.eu/publications/pub.cfm?id=6084>.

25. In what I believe to be the best methodological approach, two economists used the removal of all Warner Music's content from YouTube in January 2009 (and its restoration in October 2009) as natural shocks to the amount of music streaming and find that removal of Warner's content from YouTube led to an increase in digital downloads (compared to a control group made up of music from the other major labels).¹³ This implies that streaming on YouTube has a negative impact on digital music purchasing, and I believe this result to be consistent with my results because YouTube is much closer to an interactive service than a non-interactive service. Unfortunately, their approach did not allow for them to test the impact of non-interactive services.

26. My research is the first of which I am aware to explicitly test the impact of non-interactive webcasting services on digital downloads and to compare this to interactive webcasting services. I believe this difference to be of significant importance to the Webcasting proceedings.

27. There is, however, one other related piece of research that I believe to have findings that are consistent with mine. Joel Waldfogel (of the University of Minnesota) has a distinguished record of research into the economics of digital media. In one of his papers, he finds that since the digitization of the music industry, sales have been less concentrated amongst the most popular albums and are more distributed into the "long tail."¹⁴ Correspondingly, the percent of successful albums coming from the 3 (or 4, before Universal's acquisition of EMI)

¹³ Hiller, R., and Kim, JH, 2014. "Online Music, Sales Displacement, and Internet Search: Evidence from YouTube." Working Paper available at <http://faculty.fairfield.edu/rhiller/Research/OnlineMusicandSalesDisplacement.pdf>.

¹⁴ Waldfogel, J. 2012. "And the Bands Played on: Digital Disintermediation and the Quality of New Recorded Music." Working Paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117372.

major music labels has declined as independent labels have found greater success. Waldfogel points out that music production has always been characterized by great uncertainty, and thus many released albums are unsuccessful and many unreleased albums would have been successful if they had been released. He presents evidence that non-interactive webcasting services have significantly diminished the cost of promoting an album, making it easier for small bands or labels to release and promote an album using these services, and some of these albums find great commercial success. He documents that web radio plays tracks from a number of albums that do not get play on traditional promotional channels like terrestrial radio (albums from the "long tail," for example), providing an avenue for consumers to connect with and discover this music. Combined with the fact that a larger number of commercially successful products are coming from independent labels and albums that are not getting airplay on traditional broadcast radio, the most logical conclusion is that non-interactive webcasting services are helping to increase competition in an industry that has long been characterized by significant concentration. As well, Waldfogel's results, while answering a different question than my research in this report, are consistent with my results. Non-interactive services are promoting digital downloads (or at least having a significantly less detrimental impact than interactive services), and part of this is through exposing consumers to songs and albums that they would otherwise never have been made aware of or had a chance to sample.

I declare under penalty of perjury that the foregoing is true and correct.

Brett Danaher
Brett Danaher

10/6/14
Date

BRETT DANAHER

CURRICULUM VITAE

CAMPUS ADDRESS:

Wellesley College
Economics Department
106 Central St.
Wellesley, MA 02481

Telephone: 267.625.1748
bdanaher@wellesley.edu

RESEARCH INTERESTS:

Economics of Information Systems, Digital Strategies, Business Analytics, Industrial Organization, Copyright

ACADEMIC POSITIONS:

Visiting Research Professor – Heinz School, Carnegie Mellon	Jan 2015-
Assistant Professor - Department of Economics, Wellesley College	2010-
Post-doctoral Fellow – Heinz School, Carnegie Mellon	2009-2010

EDUCATION:

Ph.D. Applied Economics	Wharton School, University of Pennsylvania	2010
B.S. Economics	Haverford College	2000

PUBLICATIONS:

“An Empirical Analysis of Digital Music Bundling Strategies” with Yan Huang, Mike Smith, and Rahul Telang (*forthcoming, Management Science*)

“Converting Pirates Without Cannibalizing Purchasers: The Effect of Digital Distribution on Internet Piracy and Physical Channel Sales” with Samita Dhanasobhon, Michael Smith, and Rahul Telang. *Marketing Science*. INFORMS, vol 29(6), pp. 1138-1151.

“Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales” with Mike Smith *International Journal of Industrial Organization*. Vol 33, March 2014, 1-8
Lead article.

“The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France” with Mike Smith, Rahul Telang, and Siwen Chen. *Journal of Industrial Economics*. Vol. 62(3), September 2014, pp 541-553.

“Piracy and Copyright Enforcement Mechanisms” with Mike Smith and Rahul Telang (*NBER Innovation Policy and the Economy, Vol 14*)

“Understanding Media Markets in the Digital Age: Economics and Methodology” with Mike Smith and Rahul Telang (*NBER Economics of Digitization*)

WORKING PAPERS:

"Reel Piracy: The Effect of Internet Movie Piracy on Box Office Sales" with Joel Waldfogel

"Three Strikes Revisited: The Impact of New Zealand's Graduated Response Anti-Piracy Law on Digital Music Sales"

WORK IN PROGRESS:

"Plague or Panacea: Is Digital Music Streaming a Complement or a Substitute for Sales?"

"Optimizing Movie Release Windows: Evidence from a Natural Experiment"

"The Impact of Piracy Website Blocking on Media Consumption and Welfare"

"Content, Exclusivity, and Value: How Intense is Competition Between Television Distributors?"

"Google as Your Conscience: Does Internet Search Affect Consumer Propensity for Illegal Behavior?"

FELLOWSHIPS AND AWARDS:

NerdScholar 40 Under 40 "Professors Who Inspire"	2014
IDEA Research Grant, Carnegie Mellon University	2014
NBER Economics of Digitization and Copyright Research Grant	2013
Post-doctoral Fellowship, Carnegie Mellon University	2009
Research Grant, Center for the Analysis of Property Rights and Innovation, UT Dallas	2009
Ackoff Fellowship, Wharton School, University of Pennsylvania	2008

TEACHING:

Wellesley College, 2010 – present

Introduction to Statistics

Introduction to Microeconomics

The Information Economy

Industrial Organization

Wharton School, University of Pennsylvania, 2007-2009

Managerial Economics, MBA Program

Managerial Economics, Executive MBA Program

PROFESSIONAL ACTIVITIES:

Presentations

European Commission Copyright Conference	Brussels, Belgium	2014
University of Minnesota – Carlson School	Minneapolis, MN	2014
Workshop on Information Systems and Economics	Milan, Italy	2013
UC San Diego Rady School of Management	La Jolla, CA	2013
Motion Picture Association of America	Sherman Oaks, CA	2013
Statistical Challenges in E-Commerce Research	Lisbon, Portugal	2013
University of Delaware Economics Seminar	Newark, DE	2013
NBER Economics of Digitization	Salt Lake City, UT	2013
International Industrial Organization Conference	Boston, MA	2013
SOBACO Speaker Series, U. of Minnesota	Minneapolis, MN	2013
Federal Trade Commission Microeconomics Conf.	Washington, DC	2012
Workshop on Information Systems and Economics	Orlando, FL	2012
Global Music Forum, Canada Music Week	Toronto, Canada	2012
Intellectual Property Series, Osgoode Law School	Toronto, Canada	2012
Workshop on Information Systems and Economics	Shanghai, China	2011
Statistical Challenges in E-Commerce Research	Rio de Janeiro, Brazil	2011
DO&IT Seminar Series, University of Maryland	College Park, MD	2010
DISOM Seminar Series, University of Washington	Seattle, WA	2010
Workshop on Information Systems and Economics	Tuscon, AZ	2009
Carnegie Mellon Applied Economic Seminar	Pittsburgh, PA	2009
Society for Economic Research on Copyright Issues	Berkeley, CA	2009
Workshop on Information Systems and Economics	Paris, France	2008
Web 2.0 Workshop hosted by the ZEW	Mannheim, Germany	2008

Research Institutes

Initiative for Digital Entertainment Analytics (contributing faculty)	Carnegie Mellon University
--	----------------------------

Referee Service

Management Science, Journal of Economic Behavior and Organization, Economic Inquiry, International Review of Law and Economics, American Review of Law and Economics, Review of Industrial Organization, Marketing Science, Information Systems Research, Management Information Systems Quarterly

Discussant Service

NBER Economics of Digitization Summer Workshop	2014
Workshop on Information Systems and Economics	2013
International Industrial Organization Conference	2013
Statistical Challenges in E-commerce Research	2013
Workshop on Information Systems and Economics	2008

Memberships

International Industrial Organization Society
Society for Economic Research on Copyright Issues (SERCI)
American Economic Association

NON-ACADEMIC EXPERIENCE:

Consultant – Clearchannel Communications	San Antonio, TX	2013-
Consultant – Disney Studios / Verance	Los Angeles, CA	2012-
Consultant – IFPI	London, UK	2010-2012
Consultant – EMI Music	New York, NY	2009-2010
Analyst - Vanguard Group.	Malvern, PA	2000-2003

APPENDIX B: DATA

The Tracker data provides, for each individual consumer, the following variables for each of six months.

1. Number of tracks purchased on iTunes or the Amazon digital store
2. Number of visits to key non-interactive webcaster websites and time spent on those websites:¹
 - a. Pandora.com
 - b. iHeartRadio.com
3. Number of visits to key interactive webcaster websites and time spent on those websites:
 - a. Spotify.com
 - b. Soundcloud.com
4. Time with Spotify.exe open and running resident on computer
5. Visits to a large group of "music interest sites" and time spent on said sites²
6. Demographic information:
 - a. Gender
 - b. Household income
 - c. Age

The manner by which these variables are tracked affects the interpretation of any econometric models run using the data. Visits to websites are counted precisely. Time on websites is calculated as follows: a user is considered active on a website if the user interacts with the website (i.e. clicks on something) within 30 minutes. If a user closes the site, the time stops counting. If the user does not click on something within 30 minutes, the clock stops counting until the users interacts again. For example, if a user logs on to Pandora to listen to music for 90 minutes and interacts with the site (to change a track, click approval or disapproval, browse within Pandora, etc.) at least once every 30 minutes, this count as 90 minutes of web radio. If, however, a user starts a Pandora station and listens to it for 90 minutes but without interacting with Pandora at all, this will count as only 30 minutes of web radio. As a result, usage of webcasting may be understated for some users, except in cases where the total time is under 30 minutes (in such a case the user could not have listened for more than 30 minutes). This is true for time on non-interactive webcasting websites and time on interactive webcasting websites.

¹ There are, of course, non-interactive services other than Pandora or iHeartRadio (such as Apple's iRadio) and other non-interactive services than those we studied. However, after speaking with Tracker, we chose these particular services to study as they are the largest and they capture the vast majority of their respective markets.

² A list of these sites can be found in Appendix D. They are generally comprised of song lyrics sites, music blogs, and music magazine websites.

For one interactive service that I study, Spotify, the primary way that users access the service is not on Spotify.com (though they can do so there) but through an app they install on their computers. The Tracker data measure the amount of time this app is open, which does not necessarily correlate to the time that music is being played. For example, if a user opens the Spotify app and plays music for 30 minutes and then stops listening to music but leaves Spotify running for another 3 hours, the data report 3.5 hours of interactive streaming. Although this has the potential to overstate the amount of Spotify usage that occurs, it still provides a useful and reliable binary indication of whether a given individual is an active Spotify user – if one observes a user with 0 minutes of Spotify time and then a positive amount of usage, this indicates a change from no listening to some listening. Nonetheless, the end result is that non-interactive webcasting use is likely underestimated in the data (since it all occurs on websites) and interactive webcasting use may be underestimated (when it occurs on websites like Spotify.com or Soundcloud.com) or overestimated (when it occurs on Spotify.exe).

For the purposes of this report, I define the following variables:

Time on non-interactive webcasting services includes total time spent on Pandora or iHeartRadio.

Time on interactive webcasting services includes total time using Spotify (through the app or the website) or Soundcloud.

Digital song purchases includes total number of songs purchased at iTunes or Amazon's digital store (a download of a 14 song album counts as 14 songs).

Visits to music interest sites includes total visits to any of the 42 sites I've designated as indicative of an interest in music. These sites are listed in Appendix D.

Table A.1 summarizes the mean and standard deviation for each variable across individuals aggregated for all six months,³ although the variable measuring minutes on applications or websites are likely biased as described above.

³ In the very rare case of missing values in the data (less than 1-2% of observations) I assume a value of 0 as I believe they indicate a lack of any use of the site in question.

Table B.1: Descriptive Statistics for Variables

	Non-Interactive webcast hours	Used non- interactive webcast?	Interactive webcast hours	Used interactive webcast?	Song Purchases	Purchased any songs?
Mean	2.4	0.62	7.4	0.12	2.6	0.10
Std. Dev.	3.6	0.48	51.5	0.32	15.0	0.30
Conditional Mean (on some use)	3.3		61.8		25.7	
Std. Dev.	4.1		137.5		40.1	

In the data, 62% of people used non-interactive webcasting services for at least 1 hour over the six-month period. The reason that this number is high is because we asked Tracker to include a large percent of users in our sample who actually use these services. Tracker reported to us that of their total US sample, only 14% of individuals used non-interactive webcasting services over an hour during the six-month period. In the sample we received, the average individual used non-interactive webcasting service for 2.4 hours over the six months according to the data, however, this is an underestimate of actual time on webcasting for the reasons previously described in tracking website usage. 12% of individuals used interactive webcasting services for at least 1 hour with the average user observed at 7.4 hours. Conditional on having used interactive services for at least an hour, the mean usage is actually 62 hours. Again these numbers likely include an overstatement of time using Spotify.exe and understatement of time using Spotify.com and Soundcloud.com. 10% of the sample purchased at least 1 song during the period, with the average number of songs purchased being 2.6. However, among users who do purchase at least one song, the average number of purchases was 26 songs over the six months. One implication from this is that there is a large percentage of people who are not using webcasting services (either interactive or non-interactive) on their computers or paying for digital downloads. While digital music products and services is a rapidly growing market, it is far from ubiquitous.

A few demographics are also useful.

Table B.2: Demographics of Sample

Age	Percent	Income	Percent
18-21	9%	Below 15K	10%
21-24	11%	15-25K	9%
25-29	9%	25-35K	10%
30-34	10%	35-40k	6%
35-39	8%	40-50k	13%
40-44	10%	50-60k	10%
45-49	12%	60-75k	20%
50-54	11%	75-100k	14%
55-59	7%	100K +	8%
60-64	4%	<i>Mean</i>	\$55k
65-74	5%	<i>Median</i>	\$59k
75+	3%		
<i>Mean</i>	41	Gender	Percent
<i>Median</i>	42	Male	53%
		Female	47%

53% of the sample is male. The mean and median age are both in the low 40's while the median income is around \$55k and the mean is almost \$60k. Again, these statistics reflect the fact that the sample was chosen to include a wide range of webcasting activity. However, it is clear that many different ages and incomes are represented in the sample.

APPENDIX C: DETAILED MODEL

My models focus on the adoption event as the source of the treatment effect of webcasting services. But these services have been around for a while, and one might worry that people who are adopting in my sample are a different group of people than the control group and thus might have differential trends for other reasons.

The following table shows the average demographics for individuals who count as adopters (after three months of non-use) of non-interactive webcast services versus those who are not identified as adopters.

Table C1: Demographics of Adopters vs. Non-Adopters

		Income (thousands)	Age	Male
Non Interactive Webcasting	Adopters	\$59.4	41	53%
	Non-Adopter:	\$56.3	40	50%
Interactive Webcasting	Adopters	\$59.1	41	53%
	Non-Adopter:	\$61.4	40	56%

Generally, for either service, those who are identified as adopters in the regression are demographically similar to those who did not adopt during this period.

Following my description of the econometric methodology in section IV, the actual model I ran is described as follows:

$$Downloads_{it} = \beta_0 + \beta_1 Period2_t + \beta_2 Period2_t * NonIntUser_i + \beta_3 InteractiveTime_{it} + \beta_4 MusicSites_{it} + \mu_i + \varepsilon_{it}$$

$Downloads_{it}$ represents individual i 's number of songs download during period t . $Period2_t$ is a dummy variable equal to 1 if the observation is for the second period. $NonIntUser_i$ is a dummy equal to 1 if the user is observed using noninteractive webcasting services in period 2 (recall that we are limiting the sample to only individuals who did not use noninteractive services in period 1). $InteractiveTime_{it}$ is a control variable for the amount of time user i used interactive webcast services during period t . $MusicSites_{it}$ represents the number of visits of user i during period t to sites on the music interest site list and is intended as a measure of the user's interest in music during that period. μ_i represents a vector of user fixed effects.

In parallel, I can specify a similar model to determine the impact of adoption of interactive webcasting sites on purchasing.

$$Downloads_{it} = \beta_0 + \beta_1 Period2_t + \beta_2 Period2_t * IntUser_i + \beta_3 NonIntTime_{it} + \beta_4 MusicSites_{it} + \mu_i + \varepsilon_{it}$$

For this model, I only include individuals who were not observed using interactive webcasting services during period 1 so that any use in period 2 signifies new discovery and adoption. OLS results are reported in Table 1 in the body of the report. Column (i) reports estimates for the experiment with users who discover non-interactive webcasting services and column (ii) reports estimates for the experiment with users who discover interactive webcasting services. An advantage of this approach is that I only use a binary variable for adoption of the service in question, and I believe that the Tracker data can accurately measure whether a person is using a service or not even if the amount of time using it is measured inaccurately.

Column (iii) results are generated from the following model:

$$Downloads_{it} = \beta_0 + \beta_1 Period2_t + \beta_2 Period2_t * IntUser_t + \beta_3 Period2_t * IntUser_t + \beta_4 MusicSites_{it} + \mu_i + \varepsilon_{it}$$

Where only individuals who exhibit no use of interactive or non-interactive webcasting services in period 1 are considered. This limits the sample, but allows for a statistical comparison of the two coefficients to each other in the same model.

APPENDIX D: MUSIC INTEREST SITES

Below are the sites that I designated as indicative of music interest in the "music site visits" variable. They are comprised of music blogs, music magazines, lyrics sites, top 40 charts, and concert ticket sites.

1. www.rollingstone.com
2. hypem.com
3. pitchfork.com
4. allmusic.com
5. azlyrics.com
6. songlyrics.com
7. lyricsworld.com
8. spin.com
9. mojo4music.com
10. billboard.com
11. officialcharts.com
12. top40-charts.com
13. tinymixtapes.com
14. daytrotter.com
15. consequenceofsound.net
16. residentadvisor.net
17. stereogum.com
18. thelineofbestfit.com
19. youredm.com
20. popjustice.com
21. dancingastronaut.com
22. drownedinsound.com
23. fakeshoredrive.com
24. allhiphop.com
25. edmsauce.com
26. blog.largeheartedboy.com
27. rapradar.com
28. 2dopeboyz.com
29. factmag.com
30. hypetrak.com
31. indieshuffle.com
32. thewildhoneypie.com
33. lyrics.wikia.com
34. lyrics.com
35. music-new.com
36. digitalmusicnews.com
37. cmt.com
38. theboot.com
39. countryweekly.com
40. popcrush.com
41. songkick.com

42. livenation.com

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on October 27, 2014, I caused a copy of
**SOUNDEXCHANGE'S RESPONSE TO THE SERVICES' JOINT MOTION TO
COMPEL SOUNDEXCHANGE TO PRODUCE LICENSE AGREEMENTS AND
OTHER DOCUMENTS WITHHELD ON CONFIDENTIALITY GROUNDS** to be served
by U.S. FIRST CLASS MAIL and EMAIL to the Participants as indicated below:

Participants

<p>Kurt Hanson AccuRadio, LLC 65 E. Wacker Place, Suite 930 Chicago, IL 60601 kurt@accuradio.com Telephone: (312) 284-2440 Facsimile: (312) 284-2450 <i>AccuRadio, LLC</i></p>	<p>Gregory A. Lewis National Public Radio, Inc. 1111 North Capital Street, NE Washington, DC 20002 glewis@npr.org Telephone: (202) 513-2050 Facsimile: (202) 513-3021 <i>National Public Radio, Inc. (NPR)</i></p>
<p>Jeffrey J. Jarmuth Law Offices of Jeffrey J. Jarmuth 34 E. Elm Street Chicago, IL 60611-1016 Telephone: (312) 335-9933 Facsimile: (312) 822-1010 Jeff.jarmuth@jarmuthlawoffice.com <i>Counsel for AccuRadio, LLC</i></p>	<p>Kenneth L. Steinthal Joseph R. Wetzel Ethan Davis KING & SPALDING LLP 101 Second Street, Suite 2300 San Francisco, CA 94105 ksteinthal@kslaw.com jwetzel@kslaw.com edavis@kslaw.com Telephone: (415) 318-1200 Facsimile: (415) 318-1300 <i>Counsel for National Public Radio, Inc. (NPR)</i></p>
<p>George Johnson GEO Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 george@georgejohnson.com Telephone: (615) 242-9999 <i>GEO Music Group</i></p>	<p>Kevin Blair Brian Gantman Educational Media Foundation 5700 West Oaks Boulevard Rocklin, CA 95765 kblair@kloveair1.com bgantman@kloveair1.com Telephone: (916) 251-1600 Facsimile: (916) 251-1731 <i>Educational Media Foundation</i></p>

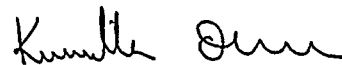
<p>Frederick Kass Intercollegiate Broadcasting System, Inc. (IBS) 367 Windsor Highway New Windsor, NY 12553-7900 ibs@ibsradio.org ibshq@aol.com Telephone: (845) 565-0003 Facsimile: (845) 565-7446 <i>Intercollegiate Broadcasting System, Inc. (IBS)</i></p>	<p>William Malone 40 Cobbler's Green 205 Main Street New Canaan, CT 06840 Malone@ieee.org Telephone: (203) 966-4770 <i>Counsel for Harvard Radio Broadcasting Co., Inc. (WHRB) and Intercollegiate Broadcasting System, Inc. (IBS)</i></p>
<p>Donna K. Schneider Associate General Counsel, Litigation & IP iHeartMedia, Inc. 200 E. Basse Rd. San Antonio, TX 78209 DonnaSchneider@iheartmedia.com Telephone: (210) 832-3468 Facsimile: (210) 832-3127 <i>iHeartMedia, Inc.</i></p>	<p>Mark Hansen, John Thorne Evan Leo, Scott Angstreich, Kevin Miller, Caitlin Hall, Igor Helman, Leslie Pope, Matthew Huppert KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C. 1615 M Street, NW, Suite 400 Washington, DC 20036 Mhansen@khhte.com Jthorne@khhte.com eleo@khhte.com sangstreich@khhte.com kmiller@khhte.com chall@khhte.com ihelman@khhte.com lpope@khhte.com mhuppert@khhte.com Telephone: (202) 326-7900 Facsimile: (202) 326-7999 <i>Counsel iHeartMedia, Inc.</i></p>
<p>Jane Mago, Esq. Suzanne Head 1771 N Street, NW Washington, DC 20036 jmago@nab.org shead@nab.org Telephone: (202) 429-5459 Facsimile: (202) 775-3526 <i>National Association of Broadcasters (NAB)</i></p>	<p>Bruce Joseph, Karyn Ablin Michael Sturm, Jillian Volkmar WILEY REIN LLP 1776 K Street, NW Washington, DC 20006 bjoseph@wileyrein.com kablin@wileyrein.com msturm@wileyrein.com JVolkmar@wileyrein.com Telephone: (202) 719-7000 Facsimile: (202) 719-7049 <i>Counsel for National Association of Broadcasters (NAB)</i></p>

<p>David Oxenford WILKINSON BARKER KNAUER, LLP 2300 N Street, NW, Suite 700 Washington, DC 20037 doxenford@wbklaw.com Telephone: (202) 373-3337 Facsimile: (202) 783-5851 <i>Counsel for Educational Media Foundation and National Association of Broadcasters (NAB)</i></p>	<p>Russ Hauth, Executive Director Harv Hendrickson, Chairman 3003 Snelling Avenue, North Saint Paul, MN 55113 russh@salem.cc hphendrickson@unwsp.edu Telephone: (651) 631-5000 Facsimile: (651) 631-5086 <i>National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)</i></p>
<p>Karyn Ablin Jennifer Elgin WILEY REIN LLP 1776 K St. N.W. Washington, DC 20006 kablin@wileyrein.com jelgin@wileyrein.com Telephone: (202) 719-7000 Facsimile: (202) 719-7049 <i>Counsel for National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)</i></p>	<p>Christopher Harrison Pandora Media, Inc. 2101 Webster Street, Suite 1650 Oakland, CA 94612 charrison@pandora.com Telephone: (510) 858-3049 Facsimile: (510) 451-4286 <i>Pandora Media, Inc.</i></p>
<p>R. Bruce Rich, Todd Larson Sabrina Perelman WEIL, GOTSHAL & MANGES LLP 767 Fifth Avenue New York, NY 10153 r.bruce.rich@weil.com todd.larson@weil.com Sabrina.Perelman@weil.com Telephone: (212) 310-8170 Facsimile: (212) 310-8007 <i>Counsel for Pandora Media, Inc.</i></p>	<p>Gary R. Greenstein WILSON SONSINI GOODRICH & ROSATI 1700 K Street, NW, 5th Floor Washington, DC 20006 ggreenstein@wsgr.com Telephone: (202) 973-8849 Facsimile: (202) 973-8899 <i>Counsel for Pandora Media Inc.</i></p>
<p>Jacob B. Ebin Akin Gump Strauss Hauer & Feld LLP One Bryant Park Bank of America Tower New York, NY 10036-6745 jebin@akingump.com Telephone: (212) 872-7483 Facsimile: (212) 872-1002 <i>Counsel for Pandora Media Inc.</i></p>	<p>Patrick Donnelly Sirius XM Radio, Inc. 1221 Avenue of the Americas 36th Floor New York, NY 10020 patrick.donnelly@siriusxm.com Telephone: (212) 584-5100 Facsimile: (212) 584-5200 <i>Sirius XM Radio Inc.</i></p>

<p>Cynthia Greer Sirius XM Radio, Inc. 1500 Eckington Place, NE Washington, DC 20002 cynthia.greer@siriusxm.com Telephone: (202) 380-1476 Facsimile: (202) 380-4592 <i>Sirius XM Radio Inc.</i></p>	<p>Paul Fakler Martin Cunniff Jackson Toof Arent Fox LLP 1675 Broadway New York, NY 10019 Paul.Fakler@arentfox.com Martin.Cunniff@arentfox.com Jackson.Toof@arentfox.com <i>Counsel for Sirius XM Radio Inc.</i></p>
<p>David Golden CONSTANTINE CANNON LLP 1001 Pennsylvania Ave. NW, Suite 1300N Washington, DC 20004 dgolden@constantinecannon.com Telephone: (202) 204-3500 Facsimile: (202) 204-3501 <i>Counsel for College Broadcasters Inc. (CBI)</i></p>	<p>Catherine Gellis P.O. Box 2477 Sausalito, CA 94966 cathy@cgcounsel.com Telephone: (202) 642-2849 <i>Counsel for College Broadcasters Inc. (CBI)</i></p>

Courtesy copies provided by electronic mail to:

<p>Dale M. Cendali Claudia Ray Bonnie Jarrett Kirkland & Ellis LLP 601 Lexington Avenue New York, NY 10022-4611 dale.cendali@kirkland.com claudia.ray@kirkland.com bonnie.jarrett@kirkland.com Telephone: (212) 446-4800 Facsimile: (212) 446-4900 <i>Counsel for Beats Music, LLC</i></p>	<p>Jeffrey Coviello Wollmuth Maher & Deutsch LLP 500 Fifth Avenue, 12th Floor New York, New York 10110 jcoviello@wmd-law.com Telephone: (212) 382-3300 Facsimile: (212) 382-0050 <i>Counsel for Spotify USA, Inc.</i></p>
--	--



Kuruvilla Olasa